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In The Supreme Court of the United States

OCTOBER TERM, 1972

NO. 76-320

DOVER CORPORATION, NORRIS DIVISION,
Petitioner

V.

NATIONAL LABOR RELATIONS BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDICES

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Dover Corporation, Norris Division, Petitioner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-styled case on June 4, 1976, in which the Court enforced an order of the National Labor Relations Board holding that Petitioner had strict liability for the unauthorized and repudiated acts of one of its supervisors.

OPINIONS BELOW

The decision and order of the National Labor Relations Board are reported at 211 NLRB No. 98 (Appendix

A, infra, pp. 1a-43a). The opinion of the United States Court of Appeals for the Tenth Circuit is reported at __ F.2d __ (Appendix B, infra, pp. 45a-57a), and the final judgment in accordance with that opinion was entered on June 4, 1976 (Appendix C, infra, pp. 59a-62a).

JURISDICTION

The opinion of the Court of Appeals was filed on April 12, 1976, modifying and stating the intention to enforce an order of the National Labor Relations Board. Before the Court of Appeals entered any order finally modifying the order of the National Labor Relations Board, and within the time periods allowable under the Federal Rules of Appellate Procedure, Petitioner filed its Petition for Rehearing. Such Petition was denied on May 14, 1976. Thereafter, counsel for Petitioner wrote to the Clerk for the Court of Appeals requesting clarification as to the date for final judgment. The response of the Clerk is set forth in Appendix D, infra, p. 63a. The final judgment and order were thereafter entered on June 4, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an employer is strictly liable under the National Labor Relations Act for the unauthorized acts of one of its supervisors, where the employer took all reasonable steps to both prevent violations and to immediately repudiate the statements when it learned of them?

2. Whether the National Labor Relations Board has failed to establish an ascertainable standard by which an employer may disavow unauthorized acts by a supervisor?

3. Whether the national labor policy is frustrated by the adoption of strict liability standards and the imposition of cease-and-desist orders against unpreventable acts?

STATUTES INVOLVED

This case involves the interpretation and application of Sections 2(2), 2(13) and 10 of the National Labor Relations Act, as amended (29 U.S.C. §152(2), (13) and §160). The texts of these statutes are set forth in Appendix E, infra, p. 65a.

STATEMENT OF THE CASE

This case arose out of an organizational drive in 1973 by the Steelworkers Union at the Petitioner's Rockford Street plant. The Rockford plant had been repeatedly subjected to organizational attempts during the past decade,[1] and both company management and employees were well aware of the restrictions placed upon management in such campaigns.

As was the practice of top management at the start of each such organizational attempt, a meeting was held with all plant supervisors in the early summer of 1973. All of the plant supervisors were informed of the "Do's and Don'ts" for supervisors, and were reminded that "the supervisor couldn't threaten, couldn't interfere, couldn't harass, couldn't spy on the employees." Several additional meetings were also held with supervisors, reminding them of these restrictions, as the union campaign progressed.

The inspection foreman, a Mr. Rike, who was found to have made certain prohibited statements, was present during all of the above meetings, as well as supervisory meetings held during prior organizational attempts. He had

[1]The record reflected that a total of five organizational attempts had occurred between 1964 and 1974.

also taken several courses regarding a supervisor's obligations under the National Labor Relations Act. Rike, a member of the Machinist's Union, was not known by management to have any anti-union feelings, as he had a standing joke in the plant that "if the Union comes in, my job would be easier . . . I'm a working foreman, and at the Elwood plant,[2] why, they don't allow foremens to do production work." In none of the prior campaigns had any of the petitioner's supervisors, including Mr. Rike, ever been even accused of the commission of any unfair labor practices.

The first incident involving Mr. Rike occurred on July 13, 1973. Mr. Rike apparently told an employee, a Charles Thompson, that "I have enough on the five of you to get you discharged for union activities." Mr. Thompson was one of the chief union organizers in the plant.[3]

Shortly thereafter, the Petitioner heard a rumor that several employees felt that they had been threatened with reprisals for engaging in union activities. The chief executive officer at the plant directed the company's attorney to investigate the matter. The attorney called the local union organizer to ask what the problem was. The organizer identified five employees who had allegedly been threatened,[4] and also identified several supervisors who had supposedly violated their rights.

After receiving this information, the Company attorney contacted the supervisors — one of whom was Rike — regarding these allegations. All of the supervisors denied the allegations made against them.

[2]The Elwood plant is one of the two other area plants owned by the Petitioner which haved had long and amicable bargaining relationships with the Steelworkers.

[3]Rike did not supervise Mr. Thompson, either directly or indirectly, and had no authority to discharge him.

[4]The NLRB only issued a complaint as to the Thompson threat, as well as a later incident involving a Mr. Curry.

Because the Company had no way to know whether the allegations were true, it decided to take precautions to reassure the employees involved. The Company attorney and the chief supervisor in the plant went to each of the five employees and told them that the Company had heard that:

> [T]hey had felt like they had been threatened by the Company supervisors, and that [the Company] wanted to assure them that this — if they had been, that they was — this was no doing of the Company and that they would take action on this thing if it were true, and that they assured them that they had a right to organize and could not be interfered with for trying to organize, could not be fired from the Company for this.

In addition, in order to quell any rumors regarding the alleged threats, a notice was placed on the bulletin boards, which stated in relevant part:

> Supervisors are forbidden by law to make any promises as to future rewards in order to get an employee to decide to join or not to join a union. They are also forbidden to threaten or harass any employee who campaigns either for or against a union.
>
> Our supervisors in the plant, who are named below, have been informed that they are not to interfere with the rights of our employees to campaign for or against unions.

Rike's name, as well as those of other supervisors supposedly involved in other incidents, was on the list. Thus, all employees were specifically advised that Rike was not authorized to interfere with the union activities of employees.

Mr. Thompson never had any reprisals taken against him, either before or after the threat. He continued to engage in union activities, wore campaign buttons, went

out on a recognitional strike and then returned, and is still working for the Petitioner.

The second incident occurred shortly after the above actions taken by the Petitioner. Mr. Rike apparently told another employee, Mr. Curry, that "[T]he people who were pushing for the union, working for the union, would probably be fired if the union failed to get in." This statement never came to the attention of the Petitioner, and it appears that Mr. Curry simply ignored it. Mr. Curry testified that he had read the notice regarding the forbidden activities of supervisors, and that he believed that Mr. Bechtold, "the boss," would not allow him to be fired for union activities.[5] Mr. Curry, like Mr. Thompson, continued his union activities and was never the subject of any reprisals.

Two members of the National Labor Relations Board panel found that the Petitioner was responsible for these statements by Mr. Rike, and that the repudiation of the threats and delineation of Rike's authority were legally inadequate to absolve the Petitioner from liability. Chairman Miller dissented, arguing that the employees were aware that Rike was making such statements outside of the scope of his authority and was unable to carry out his threats. Under these circumstances, Chairman Miller stated that he would not impute these statements to the Petitioner, where Petitioner had taken every action possible to protect the rights of its employees.

The Tenth Circuit Court of Appeals panel upheld the order of the Board on the sole ground that the statements were made by a supervisor and could be reasonably construed as being coercive. The panel made no finding that the employees construed these statements as having been made by Foreman Rike with actual or apparent

[5]Rike did not supervise Mr. Curry, either directly or indirectly, and had no authority to discharge him.

authority on behalf of the Petitioner. Indeed, the panel affirmatively found that the oral and written repudiations and reassurances were effective in negating the effects of the statements by Foreman Rike.

The decision of the panel, by ignoring the question of whether the employees knew that the statements were unauthorized and would not be carried out, imposed a standard of strict liability upon Petitioner. The effects of the repudiations were assessed by the panel solely with respect to whether a remedial order should be issued, rather than being assessed as to the question of Petitioner's liability for the statements. The panel did not discuss any reasons why a remedial order was necessary, but simply affirmed the issuance of the order as not being "clear error."

Judge Barrett specially concurred, on the sole ground that the National Labor Relations Act imposes *"strict liability"* upon employers for the statements of its supervisors, even where the statements are known by the employees to be both unauthorized and unable to be carried out. While finding that Petitioner did "everything reasonably or practicably possible to avoid a Section 8(a) (1) violation," Judge Barrett concluded that existing Board law imposes "an obligation on the employing company to insure or guarantee" that no violations of the National Labor Relations Act will occur.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW PRESENTS A DIRECT CONFLICT WITH THE DECISIONS OF THIS AND OTHER COURTS AND WITH THE LEGISLATIVE HISTORY OF THE L.M.R.A.

1. When the National Labor Relations Act was enacted in 1935, it defined an "employer" to be "any person acting in the interest of an employer." This definition led to broad findings of employer responsibility for unfair labor practices, even though the employer could not legally be bound to the actions of such persons under the common-law rules of agency.[6]

As a result of these decisions, and particularly as a result of the decision by this Court in *International Assn. of Machinists v. N.L.R.B.*, 311 U.S. 72 (1940), the Congress amended the Act in 1947 to define an "employer" to be "any person acting as an agent of an employer," and to add a new definitional clause regarding who was an "agent." These amendments aroused a great deal of controversy, as they were clearly intended to insulate an employer from liability for actions of persons who were not actual general "agents" of the employer.[7]

The stated reason for the change, set forth in the House Report which was later adopted by the Conference Committee[8] was:

> The old act included in the definition of "employer" "any person acting in the interest of an employer." Under this language, the Board frequently "imputed" to employers anything that anyone connected with an employer, no matter how remotely, said or did . . . By such rulings, the Board was often able to punish employers for things *they did not do, did not authorize, and had tried to prevent*. [Citations omitted] (Emphasis supplied)
>
> The bill, by defining as an "employer" "any person acting *as an agent* of an employer" makes employers responsible for what people say or do only when it is within the *actual* or *apparent* scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and to unions.[9] (Emphasis in original)

Even prior to these amendments narrowing the liability of an employer, this Court had expressed the view that employers should not be held liable for the repudiated and unauthorized acts of minor supervisors. Thus, in *NLRB v. Link-Belt Co.*, 311 U.S. 585, at 599 (1941), this Court stated:

> If the words or deed of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice *and if the employer may fairly be said to have been responsible for them*, they are a proper basis for a conclusion that the employer did interfere. (Emphasis supplied)

Moreover, in *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, at 521 (1941), this Court intimated that, even under the broader wording of the 1935 Act, it would have not found the employer liable if it had disavowed the unauthorized acts of its supervisors. This Court stated:

> [The employer] took no step, so far as it appears, to notify the employees that those activities were unauthorized, or to correct the impression of the employees that support of the Union was not favored by petitioner and would result in reprisals. From that time on the Board could have found that petitioner

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[6]See, e.g., the cases cited in House Report No. 245, 80th Cong., 1st Sess. 11, 1 Legislative History Of The Labor-Management Relations Act 302 (1947).

[7]See Veto Message of President Truman, 1 Legis. His. 918; Minority Report on House Report No. 245, 1 Legis. His. 359; 2 Legis. His. 1556 (Remarks of Sen. Morse in opposition).

[8]House Conference Report No. 510, 1 Legis. His. 540.

[9]House Report No. 245, 80th Cong., 1st Sess. 11, 1 Legis. His. 302 (1947). See also, 2 Legis. His. 1026, 1537 (Remarks of Sen. Taft).

was as responsible for the effect of the activities of its foremen . . . as if it had directed them in advance.

Under the rationale of the *Link-Belt* and *Heinz* cases, it is clear that this Court believed that employers retained their right under the general principles of agency law to limit the authority of their supervisors (i.e., "agents") to make certain statements or to take certain actions which did not comport with the policies of the employer (i.e., "principal"). This Court has not yet had the opportunity to squarely address this issue, which is clearly an important one.

Here, it is undisputed that Foreman Rike did not have actual authority to make the statements ascribed to him. Thus, his statements are chargeable to Petitioner only if made within his apparent authority.[10] However, as the court below expressly found, Petitioner did everything in its power to immediately inform all affected employees of their supervisors' lack of authority to make or to carry out any reprisals against employees for engaging in union activities. Thus, Foreman Rike was immediately stripped of even a semblance of apparent authority. Under such circumstances, the general common law principles of agency hold that:

> Here defendants had actual knowledge of the lack of authority of the agent. They cannot therefore rely upon apparent or ostensible authority.[11]

As will be seen below, these general principles of agency law have been consistently applied by the Circuit Courts, as well as the Board, in refusing to punish em-

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[10]See, e.g. *Dayton Bread Co. v. Montana Flour Mills Co.*, 126 F.2d 257, at 261 (6th Cir. 1942); *Anheuser-Busch v. Grovier-Starr Produce Co.*, 128 F.2d 146 (10th Cir. 1942).

[11]*Barnebey v. Barron G. Collier, Inc.*, 65 F.2d 864 (8th Cir. 1933).

ployers for acts of supervisors which the employees knew were unauthorized.

2. In addition to significant conflicts with the legislative history of the Act and the decisions of this Court, there are important conflicts with this decision and other decisions of the court below, as well as those of other Circuits and of the Board. Thus, in *Boeing Airplane Co. v. NLRB*, 140 F.2d 423 (10th Cir. 1944), the court below held that an employer who instructs both its employees and supervisors on the rights of employees under the N.L.R.A., and who takes all reasonable precautions to insure that no violations occur, cannot be held liable for the isolated, unauthorized acts of its supervisors. The *Boeing* case is strikingly similar to the instant case, except that no remedial action was taken in *Boeing*.

The Court stated therein:

> The employer is not responsible for conduct of its supervisory employees on the strict theory of agency or respondeat superior . . . When [the isolated threats are] judged in the setting and against the background in which these statements were made, we are of the opinion that the company cannot fairly be held responsible therefor. (140 F.2d at 434)

Similarly, the Sixth Circuit held in *Pittsburgh S.S. v. NLRB*, 180 F.2d 731 (6th Cir. 1950), affd. on other grounds 340 U.S. 1498 (1951), that an employer, who communicates to both its supervisors and employees its policies of strict observance of the N.L.R.A., cannot be held liable for the unauthorized and isolated misconduct of its supervisors. Likewise, the First Circuit, in *NLRB v. Garland Corp.*, 396 F.2d 707 (1st Cir. 1969) held that isolated statements by minor supervisors — contrary to the express policy of top management — were not binding on the employer. The Fourth Circuit reached a similar con-

clusion in *E.I. Du Pont de Nemours v. NLRB,* 116 F.2d 388, 400 (4th Cir. 1940).[12]

Significantly, in none of these other cases did the employer take the extraordinary measures taken herein to reassure employees of their rights to engage in union activities. Thus, this case presents an important and indefensible conflict with the decisions of other Circuits, as well as those of the Board.[13]

B. THE CASE RAISES VITAL QUESTIONS CONCERNING THE INTERPRETATION OF SECTION 2(2), 2(13) AND 10 OF THE LABOR-MANAGEMENT RELATIONS ACT WHICH HAVE NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

1. The adoption of a standard of "strict liability" of an employer, regardless of the actions taken by it in furtherance of the organizational rights of its employees, presents a vital question concerning the interpretation of Sections 2(2) and 2(13) of the L.M.R.A. Not only does such a standard contravene the legislative history of the

[12]See also, *I.L.G.W.U. v. NLRB,* 237 F.2d 545, at 551 (D.C. Cir. 1956); *NLRB v. International Longshoremen's Union,* 283 F.2d 558, at 563 (9th Cir. 1960).

[13]*Goodyear Clearwater Mill No. 2,* 109 NLRB No. 146 (1954), 34 LRRM 1481; *Crown Drug Co.,* 110 NLRB No. 139 (1954), 35 LRRM 1143; *P & V Atlas Industl. Center,* 112 NLRB No. 144 (1955), 36 LRRM 1171; *Sunset Lumber Products,* 113 NLRB No. 115 (1955), 36 LRRM 1426; *Fearn Intl., Inc.* 209 NLRB No. 37, 85 LRRM 1534 (1974); *Las Vegas Sun,* 209 NLRB No. 38 (1974) 85 LRRM 1536; *Thermalloy Corp.,* 213 NLRB No. 26 (1974), 87 LRRM 1081; *Craftsman Electronic Products, Inc.,* 179 NLRB No. 68 (1969), 72 LRRM 1345; *Tracon, Inc.,* 184 NLRB No. 18 (1970) 74 LRRM 1648; *International Harvester Co.,* 180 NLRB No. 158 (1970), 73 LRRM 1331; *Kisman Transit Co.,* 78 NLRB No. 13 (1948), 22 LRRM 1165; *Walgreen Co.,* 203 NLRB No. 36 (1973), 83 LRRM 1059; *Craftsman Electronics Prods., Inc.,* 179 NLRB No. 68 (1969), 72 LRRM 1345.

Act, it also presents a clear conflict with the national labor policy.

Under the rationale of this decision, an employer is powerless to voluntarily expunge the effects of unauthorized statements of its supervisors. In essence, the decision holds that an employer's voluntary notice to its employees, both written and oral, and broader in scope than the NLRB remedial order subsequently issued, is insufficient to remedy potential violations of the Act. Neither the decision of the Board nor of the court below explain how this ruling is in accordance with the national labor policy.

It is, of course, well-established that an employer is required to give oral reassurances to its employees only when unfair labor practices are pervasive.[14] However, the broad oral and written reassurances given here were found to be legally insufficient, even though the court below found them to be effective, because the court below believed that the Petitioner was strictly liable for them.

This leads to the incongruous result that, even though an employer does much more than the NLRB could require,[15] the NLRB treats it in the same manner as an employer who did nothing. This is clearly contrary to the national labor policy. Indeed, a pragmatic employer would seem to be encouraged to take advantage of any statements that are made, because the end result is the same. Moreover, by seeking to give reassurances, the employer may well fear that such actions may be construed in a later evidentiary hearing as a tacit admission of guilt.

[14]*J.P. Stevens & Co., 157 NLRB No. 90 (1966); Jackson Tile Mfg. Co.,* 122 NLRB 764 (1958). See also, *N.L.R.B. v. Laney & Duke Co.,* 369 F.2d 859, 63 LRRM 2552 (5th Cir. 1966), wherein the Fifth Circuit refused to enforce an order to an employer to read a notice on the grounds that such is "unnecessarily embarassing and humiliating to management." (63 LRRM at 2558).

[15]See e.g., *NLRB v. Express Publishing Co.,* 312 U.S. 426 (1941).

Perhaps the most disturbing and far-reaching aspect of this decision is, however, the vulnerability with which it leaves an employer to later contempt proceedings in the Circuit Court. This Court recognized in *May Department Stores v. NLRB,* 326 U.S. 376 (1945) that an employer has a vital interest in whether a particular activity is enjoined. As this Court stated:

> The scope of injunctions which follow National Labor Relations Board determinations is important to employer and employee. While contempt proceedings can be instituted only by the Board and in the public interest, the possibility of contempt penalties by the court for future Labor Action violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities. (326 U.S. at 388)

Here, even though the court below found that the Petitioner had done everything possible to prevent the commissions of any violation, the court enforced an N.L.R.B. order enjoining the Petitioner from future violations. However, Petitioner is as helpless to protect itself from contempt proceedings as it was to prevent the initial actions. As Judge Barrett concluded in the decision below, "there is nothing fair" about such a rule.

2. This Court must establish standards by which the Board may issue, and the Circuit Courts review, NLRB cease-and-desist orders. The Board, without any analysis or explication of the reaons for the need for a remedial order, seemed to issue a cease-and-desist order as a matter of course. The court below failed to conduct any meaningful review of the overall necessity for a cease-and-desist order, considering such to be within the peculiar province of the Board.

This seems contrary to the requirements laid down by this Court in *May Department Stores Co. v. NLRB,* supra, wherein this Court held that:

> The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice *** affecting commerce." Section 10(a). (326 U.S. at 390)

In view of the obligation placed upon the court below to assess the "reasonableness and fairness of Labor Board decisions,"[16] and the conclusion of the court below that the order was not fair, the decision below is plainly wrong.

In the absence of any cogent explanation why a cease-and-desist order is appropriate against Petitioner, although its record both before and after this one incident has been perfect, this Court must reverse. In the alternative, this case should be remanded to the Board with instructions to explicate its reasons for the need for a cease-and-desist order in cases such as this.

As was noted in *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 188, 8 LRRM 438 at 447-448:

> The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (Sec. 10(e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis for its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.

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[16] *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

APPENDIX A

MFJ
211 NLRB NO. 98 D — 8560
Tulsa, Okla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD

DOVER CORPORATION, NORRIS DIVISION
and Case 16 — CA — 5224
UNITED STEELWORKERS OF AMERICA, AFL — CIO — CLC

UNITED STEELWORKERS OF AMERICA, AFL — CIO — CLC
Cases 16 — CC — 467 and
and 16 — CB — 780

DOVER CORPORATION, NORRIS DIVISION

DECISION AND ORDER

On December 17, 1973, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, the Company and the Union filed exceptions and supporting briefs, General Counsel filed a brief in support of the Administrative Law Judge's Decision and the Company filed a brief in answer to the Union's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order only to the extent consistent herewith.

To clarify the extent and basis of our decision we shall briefly recite the pertinent facts. In May 1973 the Steelworkers began organizing employees at Dover's so-called O'Bannon plant, one of three Dover plants in the Tulsa area. The consolidated complaint alleged that, on July 7, Company Inspector Sutterland told union adherent Clyde Waid that he had better hope for a union victory. Otherwise, according to Sutterland, he had been told by Inspection Foreman Walter Rike that heads would roll. The complaint further alleged that Rike himself in conversations with union adherents Curry and Thompson on July 13 and August 8, respectively, stated that he had enough on union supporters to have five of them discharged and that the people pushing the Union would probably be fired if the Union lost. All three conversations allegedly violated Section 8(a)(1).

With respect to the Union, the consolidated complaint alleged that by its picket line conduct from on or about August 9 to August 20, 1973, the Steelworkers sought to induce and encourage individuals employed by the Chief and Rose trucking companies to engage in a strike or refusal to handle goods or perform services for their

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[1]The parties have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

employers. Furthermore, the complaint alleged that by its conduct on August 13 and 14 the Union threatened, coerced, and restrained supervisors of Chief and Rose with the object of forcing or requiring Chief and Rose to cease doing business with Dover. By the above-described conduct the Union allegedly violated Section 8(b)(4)(i) and (ii)(B), as well as Section 8(b)(1), of the Act.

Finally, the consolidated complaint alleged that the Union violated Section 8(b)(1) of the Act by reason of the conduct of pickets, on August 10 and thereafter, directed against nonstriking Dover employees Myrna Hinds, Michael Jones, and Cheatam Scott.

The facts giving rise to the 8(b)(4)(i) and (ii)(B) allegations of the complaint indicate that on August 9, following the Company's rejection of a written union demand for recognition, Union Staff Representative Carl Oldham visited company offices to renew the demand. When Dover officials declined further discussion, Oldham called the strike and that same day established a picket line at the "O'Bannon" plant. At no time were pickets established at the two other Dover plants in the area, both of which the Steelworkers already represented in a separate bargaining unit.

On August 9, Herbert Clayton, a driver for the Rose Truck Line, drove to the "O'Bannon" plant to deliver freight. Clayton's whereabouts at the time of the hearing were unknown and therefore the General Counsel presented Wayne Roy, a nonstriking Dover employee who testified to certain alleged occurrences and conversation on that date.[2]

According to Roy, as he was about to unload the Rose truck on August 9, the Rose driver stopped him

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[2]Through inadvertence the Administrative Law Judge's Decision indicates that the event of August 14, discussed hereafter, occurred on August 9.

and announced that he would not make the delivery. Roy testified that when the Rose driver started to get back into his truck he was approached by about 10 men, some of whom were carrying picket signs and were known by Roy to be strikers. The pickets indicated to the Rose driver that they had taken the keys from his truck and would not return them until he agreed not to cross the picket line in the future. Rose further testified that he saw pickets spread nails under the truck's tires and heard them tell the Rose driver that he would be handing his head to them if he returned. After this the men threw the keys at the driver and he left.

On August 13, James Mounce, the assistant safety director of Chief Freight Lines, and John Ayres, Chief's terminal manager, drove to the "O'Bannon" plant to make a pickup. Mounce and Ayres were called upon to drive the Chief truck because Chief's regular drivers, who are Teamsters, had exercised their contract right not to cross what they considered a primary picket line at the Dover plant.

A brick and a piece of concrete were thrown at the Chief truck while it was parked at the Dover plant. Also, one of the pickets allegedly stood near the the truck yelling, "Boom! I just blew up your truck." Shortly after these incidents occurred, Union Representative Oldham in the company of several pickets walked up to the truck while it was still parked at the loading dock. Someone in the group asked Mounce, "You're the first one to break our picket. Aren't you Teamsters?" One of the other pickets who apparently recognized Mounce and Ayres said that they were supervisors and the pickets walked away without further incident.

On August 14, Rose driver Clayton accompanied by Rose's terminal manager, Clyde Buckner, drove to the Dover plant to make a pickup. When Clayton and Buckner

crossed the picket line, pickets called out epithets and later an unidentified person or persons did about $25 worth of damage to the Rose truck while it was parked on the Dover premises. Buckner subsequently complained to Dover officials about plant security and indicated his unwillingness to make future pickups and deliveries unless conditions improved.

With respect to the 8(b)(1) charges, the complaint alleged that on August 10 pickets questioned nonstriking Dover employee Myrna Hinds as she crossed the picket line and told her that they knew her husband belonged to a union. One of the pickets intimated that her husband's union might take some action if they found out she was crossing a picket line. Mrs. Hinds was disturbed by this suggestion and returned home to discuss the matter with her husband who told her he did not believe his union would be concerned. Mrs. Hinds' husband thereafter escorted her across the picket line. On a later occasion picket Clyde Waid took pictures of Mrs. Hinds and her husband crossing the line and another picket appeared to be taking down the license number of their car.

Also on August 10, nonstriking Dover employee Mike Jones was allegedly warned as he crossed the picket line that he had better move his motorcycle or it would not be in the same shape as when he left it. He was subsequently cursed by pickets and someone threw coffee on him as he entered the plant. On leaving work that day Jones discovered that his motorcycle tires had been slashed.

Finally, pickets Charlie Thompson and Frank Roden allegedly followed nonstriking employee Cheatam Scott to his car after he left work on August 10. Thompson and Scott engaged in a heated conversation during which Thompson threatened to assault Scott because in Thompson's eyes Scott had let him down by not joining the

strike. The exchange between the two ended with Thompson telling Scott, "We'll be back to talk to you." Prior to his conversation with Thompson, Scott told Union Representative Oldham that the Union had no right to call the strike and that he would not join it.

On the day after his argument with Thompson, Scott found that his front porch had been splattered with paint from a paint bomb made out of a light bulb. Several days later, on August 15, Scott's car mysteriously blew up in his garage.

With respect to the allegations of the consolidated complaint as detailed above, the Administrative Law Judge found the three conversations, involving union adherents Curry, Thompson, and Waid on the one hand and Sutterfield and Rike on the other, violative of Section 8(a)(1).

Apparently on the basis of Union Representative Oldham's presence during or just after alleged acts of picket misconduct, the Administrative Law Judge concluded that the Union could be held liable for the conduct of pickets at the struck plant. Having found that the activities of pickets against drivers and supervisory personnel of the Rose and Chief truck companies attempting to cross the picket lines constituted illegal secondary pressure, he reasoned that the Union by such activities violated Section 8(b)(4)(i) and (ii)(B) of the Act.

Moreover, the Administrative Law Judge found the damage done to employee Jones' tires and employee Scott's home and car was attributable to the strikers and hence to the Union. Accordingly, he found that the Union had violated Section 8(b)(1)(A) as alleged.

Turning first to the allegations of union unfair labor practices, we have considered the Union's general defense that nothing in the record evidences union authorization of unlawful conduct by pickets and therefore the Union cannot be held liable for such conduct. We disagree.

In support of its contention that it should not be held liable for picket misconduct, the Union noted that its only authorized agent, Carl Oldham, was absent from the picket line for long periods of time and in fact arrived at the struck plant only after some of the incidents alleged in the complaint, including, for example, the rock and concrete throwing incident involving the Chief truck on August 13, had taken place.

The short answer to the Union's contention in this regard is to point out that Oldham was actually present during some misconduct. For example, the Administrative Law Judge found that Oldham, in the company of pickets Thompson, Waid, and Curry, was present on August 10, during the several incidents of alleged harassment and coercion directed against nonstriking employee Mike Jones. These incidents included threats by Waid and Curry, as well as the throwing of coffee on Jones by an unidentified person as Jones sought to enter the plant.

Nothing in the record indicates that Union Agent Oldham did anything to restrain, reprimand, or discipline any picket in connection with these incidents. In fact it does not appear that Oldham initiated any measures calculated to curtail or prevent further misconduct, even though he was aware that a state court had issued a temporary restraining order against picket misconduct on August 10 and citations for contempt of the order on August 13.[3]

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[3]It is well settled that when misconduct takes place in the presence of a union agent who does nothing to disavow it or to discipline the offenders, the union assumes responsibility for the conduct. *Food Stores Employees Union, Local 347 (Davis Wholesale Co., Inc.).* 165 NLRB 264, fn. 1; *Local 918, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Tale-Lord Manufacturing Co., Inc.).* 206 NLRB No. 102.

Although in cases where there has been only an isolated instance of misconduct, the presence or absence of a union agent may be

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Furthermore, pickets Thompson and Waid (both of whom were repeatedly involved in incidents of alleged misconduct including the picturetaking of employee Hinds and her husband, the August 9 incident involving the Rose truck, and the threats to employees Jones and Scott) were prominent in the Union's organizing campaign and on the picket line, and both were present on August 10 when Union Agent Oldham by his silence and inaction in effect condoned picket misconduct.

As for the substance of the 8(b)(4)(i) and (ii)(B) violations found by the Administrative Law Judge, we note at the outset that he failed to advance a specific rationale for his findings other than the conclusionary observation that an object of the Union's picketing at the Dover plant was to "enmesh" Rose and Chief employees and to cause them to refuse to make their regular pickups and deliveries. The Administrative Law Judge was apparently persuaded that the abusive language and threats directed at Rose and Chief employees and the damage done to their trucks while at the Dover premises was sufficient to bring the

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(Footnote continued)

crucial on the issue of union liability, when, as here, there have been repeated incidents of alleged misconduct, some of which has been observed by a union agent, the union cannot be heard to plead its lack of knowledge or participation. In fact in instances where there have been repeated outbreaks of misconduct not participated in or even observed by the union but the union has failed to take steps to halt further outbreaks of such misconduct, union liability has been found. *Teamsters, Local 783 (Coca-Cola Bottling Company of Louisville).* 160 NLRB 1776. In this regard we note, contrary to the Union's contention, that the unexplained and extended absence of the union agent charged with overseeing the picket line from the picket line, after he has reason to believe misconduct has occurred and may occur again, may itself be reason to draw the inference of union culpability.

Union's conduct within the prohibitions of Section 8(b)(4).[4] We disagree.

It would indeed be remarkable if a union in establishing a picket line at the premises of an employer with whom it had a primary dispute did not have as an expectation and object the halting of regular pickups and deliveries by "neutral" employers. In short, the primary strike is aimed at applying pressure by stopping the struck employer's day-to-day operations. Just as clearly the fact that employees of "neutrals" honor the picket line and refuse to pick up or deliver cannot by itself transform lawful primary picketing into unlawful secondary conduct. Such is precisely the import of the proviso to Section 8(b)(4) as interpreted by the Supreme Court. *Local 761, International Union of Electrical, Radio and Machine Workers, AFL — CIO* v. *N.L.R.B.*, 366 U.S. 667.

Nor is it relevant in the context of an alleged 8(b)(4) violation that primary picketing may be accompanied by violence. As the Supreme Court pointed out in *United Steelworkers of America [Carrier Corp.]* v. *N.L.R.B.*, 376 U.S. 492, 509 (1964): "[T]he legality of violent picketing must be determined under other sections of the statute or under state law." Since in the instant case it is evident that all picketing occurred at the premises of the struck Employer and that the attention of the union pickets

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[4]The Administrative Law Judge failed to make specific findings with respect to the allegation that the conduct of union pickets with regard to the employees and trucks of the Rose and Chief companies was violative of Sec. 8(b)(1) as well as Sec. 8(b)(4) of the Act. In view of the testimony of employee Roy we find the August 9 conduct of union pickets violative of Sec. 8(b)(1). As for the incidents of vandalism and other alleged misconduct on August 13 and 14, however, we find the evidence of picket responsibility at best is meager. Accordingly, and inasmuch as findings of violations as to these incidents would be merely cumulative, we find it unnecessary to make conclusory findings in this regard.

was directed toward Rose and Chief employees only as they attempted to cross the primary picket line to make their regular pickups and deliveries, no violation of Section 8(b)(4) has been made out.[5]

In addition to his findings with respect to the 8(b)(4) allegations, as indicated before, the Administrative Law Judge found that the Union violated Section 8(b)(1)(A) by threatening and coercing nonstriking company employees who cross the picket line, and that the Company violated Section 8(a)(1) by statements made to certain employees by a company supervisor.

Apparently through inadvertence the Administrative Law Judge failed to find specifically that the occurrences of August 10, and thereafter relating to the attempt of nonstriking employee Hinds to report to work, violated Section 8(b)(1)(A). As previously described, these incidents included the questioning of Mrs. Hinds by pickets with regard to the union affiliation of her husband, as well as the intimation by pickets (one of whom was known by Mrs. Hinds to have relatives in her husband's union) that his union might react adversely to her conduct in crossing the picket line. Shortly thereafter a picket photographed Mrs. Hinds and her husband as he escorted her through the picket line and a picket appeared to be taking down the license number of their car. We conclude that the questioning of Mrs. Hinds, coupled with the picture-taking and license notation, was calculated to instill in Mrs. Hinds' mind a fear of retribution because of her refusal to join the strike. Accordingly, we find such con-

[5]This case is clearly distinguishable from *Teamsters Local 695*, 204 NLRB No. 139, wherein the Board found the union to have violated Sec. 8(b)(4) by its conduct in following up its demands on neutrals to cease doing business with the struck employer by damaging trucks and equipment belonging to the neutrals on the neutral's premises. Compare, *Puerto Rico Newspaper Guild, Local 225*, 201 NLRB No. 69.

duct violative of Section 8(b)(1)(A). Cf. *Cleveland Local No. 24 — P, Lithographers and Photoengravers International Union, AFL — CIO (Akron Engraving Company, Inc.)*, 160 NLRB 949.

We also find, as did the Administrative Law Judge, that the Union violated Section 8(b)(1)(A) with respect to the August 10 incidents involving Mike Jones. As discussed previously, Union Agent Oldham was present during most of the exchanges between Jones and the pickets and was across the street, but not more than 15 feet distant, when someone threw coffee on Jones.[6] We also agree with the Administrative Law Judge that the Union may be held liable for the damage done to Jones' motorcycle. With respect to this finding we note that Jones was specifically warned by striker Clyde Waid that he had better move his motorcycle or he would not find it "in the same shape" as when he left it. Union Agent Oldham was standing nearby when Waid issued this warning. After work that day Jones walked to the employee lot across the street from the plant where he discovered that the motorcycle tires had been slashed.

Apparently based on the absence of direct evidence of the identity of the person or persons responsible for the misconduct, the Union contends that the finding of striker responsibility for this act should not be sustained. In view of the strong circumstantial evidence of striker culpability, however, we are satisfied that the Administrative Law Judge's finding is warranted.[7] In this regard

[6]From the record it appears that only union pickets were in the vicinity when coffee was thrown on Jones. At the time Jones was still carrying on an exchange with Oldham who was seeking to dissuade him from going to work.

[7]Compare, *Teamsters Local 695 (Wisconsin Supply Corporation)*, 204 NLRB No. 139.

we note the concomitant uttering of the warning or threat of damage to the motorcycle and the occurrence of the damage, the proximity of the parking lot to the picket line, the fact that this misconduct was similar in kind to other acts of vandalism charged against strikers, and finally the fact that Jones was himself the target of repeated picket abuse. Consistent with our earlier discussion of the basis on which the Union may be held responsible for the misconduct of pickets, we conclude that the Steelworkers violated Section 8(b)(1)(A) by this and the other coercive acts directed against employee Jones.

On the other hand, we do not agree with the Administrative Law Judge's finding that the strikers and hence the Union can be held responsible for throwing paint on employee Cheatam Scott's porch on August 11 and for blowing up his car on August 15. Both of these incidents were remote from the picket line and, although Scott was involved in a dispute with union picket Thompson on August 10, they were unrelated to any specific threat made at that time or thereafter. Furthermore, there was no other probative evidence introduced at the hearing to link any picket to either event and, insofar at least as the damage to Scott's car is concerned, it is not altogether clear on this record that the damage was not the result of an accidental explosion.[8]

As for the initial confrontation between Thompson and Scott on August 10, however, we conclude that Thompson's conduct on this occasion was coercive and we find it violative of Section 8(b)(1). The evidence with respect to this incident is that Thompson, accompanied

[8]Even were it shown that the explosion was not accidental, in an instance as here where the particular violent act differs so dramatically in kind and degree from the acts of misconduct otherwise proven against the Union, absent some independent evidence we are extremely reluctant to draw an inference of union liability.

by another striker, approached Scott as the latter walked to his car after work. Thompson asked Scott what he was doing at the plant. When Scott replied that he was working and that the Union had no right to call the strike, Thompson accused Scott of having let him down (Thompson had solicited Scott's signature for the Union during the campaign) and threatened Scott with a physical beating. As Scott entered his car Thompson and the second striker, Frank Roden, shouted at him and Thompson said, 'We'll be back to talk to you." The responsibility of the Union for Thompson's threats is established by the evidence that earlier on August 10 Thompson had been present during picket misconduct directed against another nonstriker, Jones, and had witnessed Union Agent Oldham's condonation by silence of such misconduct.

We also agree with the Administrative Law Judge's finding that the conversations between Foreman Rike and union adherents Curry on July 13 and Thompson on August 8 were violative of Section 8(a)(1).[9] Although

[9]Chairman Miller cannot agree with his colleagues' finding that the Company violated Sec. 8(a)(1) of the Act by remarks made by a minor supervisor. The supervisor, Rike, allegedly threatened two employees Curry and Thompson, with discharge for union activities. However, Rike did not supervise these two employees and apparently had no authority to either discharge them or recommend their discharges. The Company had no knowledge, or any obligation to know, that the remarks were made. Moreover, it had made every effort to inform employees that the Company would protect their right to campaign for the Union. Indeed, prior to the events in question, upon hearing rumors that the Union felt some employees had been threatened, the Company made a full investigation. In spite of the fact that supervisors denied threatening employees, the Company contacted individual employees, including Curry and Thompson, and specifically informed them that the Company would protect their rights to engage in union activity. In addition, notices were posted on the bulletin boards informing all employees of their legal right to campaign for or against the Union and that supervisors had been instructed not to interfere

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our colleague chooses to characterize Rike as a "minor" supervisor lacking any authority over the employees who were the targets of his threats, the evidence is plainly otherwise. Thus, for example, Rike himself did not disagree with Curry's assertion that all employee work required Rike's "OK." Nor was it controverted that inspectors under Rike's control could require employees to redo their work to the inspector's satisfaction. Consequently, it is not difficult to understand why employees might well be apprehensive about arousing Rike's enmity. As for the Company's supposed attempt to counteract the effects of Rike's coercive statements, this consisted of little more than some general bromides by the Company's counsel about the Company's aims and good intentions. It is significant that Rike was never himself disciplined or rebuked because of his statements.

We find no probative evidence in the record, however, to support the Administrative Law Judge's finding of a violation of Section 8(a)(1) predicated on an alleged remark by Company Supervisor Rike to employee Clyde Waid. The record in fact shows only Waid's testimony concerning an alleged statement by employee Sutterfield to Waid to the effect that Sutterfield understood that Rike had said that if the Union did not get in some heads would roll. At the hearing the Administrative Law Judge assured counsel for the Company that, in view of the hearsay nature of Waid's testimony, under no circumstances would he make that testimony the basis for an

(Footnote continued)

with these rights. In these circumstances, Chairman Miller cannot infer that employees would assume that Rike was either speaking for the Company or in a position to carry out the threats that he made. Accordingly, he would not find the Company responsible for this minor supervisor's remarks, made outside the scope of his apparent authority, and would dismiss the complaint in Case 16 - CA - 5224.

unfair labor practice finding. Despite his assurances the Administrative Law Judge inexplicably and erroneously found the violation.

Finally, we find merit in the Company's exception to that part of the Administrative Law Judge's recommended Order requiring Dover to post remedial notices at all its plants in Tulsa, Oklahoma. The record here indicates that the Company's misconduct was not pervasive and occurred only at the struck Rockford Street plant. Furthermore, there was no evidence that employees at the Company's other two plants in Tulsa, who are already represented by the Steelworkers in a separate bargaining unit, were in any way affected by that misconduct. Accordingly, we shall modify the Administrative Law Judge's Order so as to require the posting of remedial notices only at the Company's Rockford Street plant.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent, Dover Corporation, Norris Division, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively warning employees that if the Union was successful in its organizational program a substantial number of union adherents would be dismissed.

(b) Coercively warning employees that if they continue their union activity the Respondent possessed sufficient grounds for discharging them.

(c) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action:

(a) Post at its plant at 400 South Rockford Street in Tulsa, Oklahoma, copies of the attached notice marked "Appendix A."[10] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent Company has taken to comply herewith.

B. Respondent, United Steelworkers of America, AFL–CIO–CLC, its officers, agents, and representatives, shall:

1. Cease and desist from in any manner threatening, coercing, or restraining employees of Dover Corporation, Norris Division, or of Rose Truck Lines, in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action:

(a) Mail a copy of the attached notice marked "Appendix B"[11] to each of its members and post copies thereof

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[10]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[11]See fn. 10, *supra*.

at its business office and meeting hall in Tulsa, Oklahoma. Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by the Union's official representative shall, immediately upon recepit thereof, be mailed to each member, posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken to insure that such notice is not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 16 for posting by Dover at all locations where notices to employees are customarily posted, if said company is willing to do so.

(c) Notify the said Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. June 25, 1974.

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT coercively warn employees that if the Union is successful in its organizational program a substantial number of adherents of the Union will be dismissed.

WE WILL NOT coercively warn employees that if they continue their activity in behalf of the Union we have sufficient grounds for discharging them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

DOVER CORPORATION,
NORRIS DIVISION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817-334-2921.

APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National labor Relations Board
An Agency of the United States Government

WE WILL NOT in any manner threaten, restrain, or coerce employees of Dover Corporation, Norris Division, or of Rose Truck Lines, in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

UNITED STEELWORKERS OF
AMERICA, AFL — CIO — CLC
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room — A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817-334-2921.

JD-749-73
Tulsa, Oklahoma

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

DOVER CORPORATION,
NORRIS DIVISION
and Case No. 16-CA-5224
UNITED STEELWORKERS
OF AMERICA,
AFL — CIO — CLC

UNITED STEELWORKERS
OF AMERICA,
AFL — CIO — CLC
and Case No. 16-CC-467
DOVER CORPORATION, NORRIS DIVISION

UNITED STEELWORKERS
OF AMERICA,
AFL — CIO — CLC
and Case No. 16-CB-780
DOVER CORPORATION,
NORRIS DIVISION

Evert P. Rhea, Esq., of Fort Worth, Texas, for the General Counsel.
Mary T. Matthies, Esq., and *Frank B. Wolfe, III, Esq.*, of Tulsa, Okla., for the Respondent Company.
James E. Frasier, Esq., of Tulsa, Okla., for the Union.

JD-749-73

DECISION

Statement of the Case

IVAR H. PETERSON, Administrative law Judge: I heard this case in Tulsa, Oklahoma, on October 9, 10, and 11, 1973, based on charges, as amended, filed by United Steelworkers of America, AFL CIO CLC, herein referred to as the Union, against Dover Corporation, Norris Division (16-CA-5224), consolidated with two other cases, filed against the Union by the Company (16-CC-467 and 16-CB-780). In substance, the consolidated complaint alleged that the Company, by the actions of Walter Rike, inspection foreman and an agent of the Company, warned employees that if the Union were successful in its organizational campaign a substantial number of Union adherents would be dismissed and that Rike also, on August 8, warned employees that if they continued their union activity he possessed sufficient grounds for their discharge. In addition, the complaint alleged that Chief Freight Lines Co., Inc., herein called Chief, and J. H. Rose Truck Lines, Inc., herein called Rose, both motor freight lines which made pickups and deliveries at the Company's plant, were coerced, threatened, and restrained on or about August 9 to 20, by officers, agents and representatives of the Union by means of picketing, requests, appeals, orders, instructions and other means to induce and encourage individuals employed by the foregoing employers to engage in a strike or refusal to transport or otherwise handle goods or commodities or to perform services for their respective employers.

The complaint further alleged that on August 13 and 14, the Union, by its officers, agents and representatives, threatened, coerced and restrained Mounce (a supervisor of Chief) and Buckner (a supervisor of Rose), and other

persons engaged in commerce, by threatening them with harm to their persons or equipment if they continued to do business at the Company's plant. These activities, so the complaint alleged, were engaged in, in order to force or require Chief and Rose and other employers to cease doing business with the Company or other persons. Finally, the complaint alleged that commencing on or about August 9 and continuing through August 13, the Union, by its officers and agents and representatives, restrained and coerced employees of the Company in the exercise of their Section 7 rights by various specified forms of conduct.

With respect to the Company, the complaint alleged that the Company's activities were violative of Section 8(a)(1) and Section 2(6) and (7) of the Act, and that the acts of the Union, described in the complaint, were violative of Section 8(b)(4)(i), (ii)(b) and Section 2(6) and (7) of the Act.

In its answer, duly filed on September 21, Dover moved that the cases be severed and that insofar as the employer was concerned they be dismissed. I denied the motions. The Union, in its answer, admitted certain jurisdictional allegations but denied those concerning unfair labor practices on its part.

Upon the basis of the entire record in the case, including my observation of the witnesses as they testified and a careful consideration of the briefs filed by counsel for all parties on or about October 10, and a reply brief filed by the Company on December 6, I make the following:

Findings of Fact

The Company, an Oklahoma corporation, maintains a plant in Tulsa where it is engaged in the manufacture of oil field equipment. The Company admits and I find that in the past year it sold and distributed from its Tulsa

plant products valued in excess of $50,000, which products were shipped to states other than the State of Oklahoma, and that it is accordingly engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

Background

The Union began an organizational campaign at the Tulsa plant sometime in May. Edwin Bechtold, in charge of manufacturing, testified that he was familiar with prior organizational activities at the plant and that he first became aware of the current organizational activity around the first of July. After picketing began Bechtold on several occasions met with the supervisors "pointing out what they could and couldn't do during this period of time." Sometime early in August, the Union demanded recognition and the employer replied, suggesting that the Union file an election petition. On August 9, Carl Oldham, the Union organizer, came to the plant in an attempt to see the Chief Executive Officer, Vice President Bechtold. Prior to that time Oldham had received approval for a recognitional strike. Oldham, in company with several plant employees, sought to see Bechtold but the latter sent word that the employees should follow the customary grievance procedure and that Oldham should contact the attorneys for the Company. After a relatively brief exchange, Oldham stated "consider yourself struck," and he and the group of employees with him walked out. They then proceeded to make picket signs and began picketing at the various entrances to the building. According to Oldham, he instructed pickets "not to interfere with any trucks that were coming in or going out, any employees coming in or

going out. They did have a right to talk to the people. They didn't have to be a bunch of mummies."

It was during the period from about August 9 to 21 that the Company allegedly engaged in several violations of Section 8(a)(1) of the Act, and that the Union engaged in violations of Section 8(b)(1)(a) and 8(b)(4)(i) and (ii)(B). So far as appears from the record, all allegedly illegal activity by either the Company or the Union ceased on or about August 21.

B. *Alleged Violations of Section 8(a)(1) by Company*

James Curry, an employee who had worked as a turret lathe operator for the Company for approximately 4 years, testified that Walter Rike, a supervisor, spoke to him on August 8, stating that "the people who are pushing the Union, work for the Union, would probably be fired if the Union failed to get in." I infer that what Rike meant by this remark was that if in fact the Union became the exclusive representative of the employees it would be in a position to protect them from any disciplinary action by reason of their union activity. Curry wore Union buttons on his work shirt and testified that he actively engaged in passing out literature and in talking to employees when he had an opportunity. Rike was present one day when Curry was passing out Union literature during the lunch hour. On that occasion, so Curry testified, plant superintendent William Uto was present and told Curry and another employee that they were not allowed to pass out union literature on company property.

Charles Thompson, an employee who had worked for the Company about 6 years, and who at the time of the hearing was an automatic turret lathe operator, testified that Rike was the supervisor over the inspection department. According to Thompson, he had a conversation with

Rike on or about July 13. Rike, holding a document purporting to be a Norris contract in his hand, made the following remarks: "I don't see why you guys want a union in here, because you have better benefits and wages than the Norris plant does." Later that afternoon, according to Thompson, Rike said, "if you guys are going to play this way, I have enough on five of you to get you discharged for union activities." Thompson had worn union buttons and had attended union meetings. Rike, so Thompson related, had engaged Thompson in conversations concerning the Union and had stated on one occasion that if the Union came in it would be easier on him (Rike).

Clyde Waid, also a turret lathe operator the past 4½ years, testified that when employees began exhibiting interest in the Union he "vocally supported the Union, wore campaign buttons [and] . . . put campaign stickers on my tool box and on my automobile." He also solicited employees to sign union cards. Waid testified that he solicited an employee named Sam Johnson in the presence of Rike. According to Waid, Rike has four or five persons directly under his control.

Mike Jones, an employee, testified that when he drove up to the plant on his motorcycle on the morning of August 10, to go to work, he was approached by Waid and another employee. Waid, so Jones testified, stated that "if I was planning on crossing the picket line" he had "better move that . . . motorcycle if I wanted it in the same shape it was, when I came back out." Oldham was present throughout this conversation. Jones did move his motorcycle and, as he crossed the street to enter the plant, Oldham asked him if he was going in. When Jones replied in the affirmative, Oldham stated, "You are making a mistake." As Jones proceeded into the building, someone threw coffee on him. Later in the day of August 10, Jones went out on his lunch break and, when he re-

turned, Oldham and several pickets in his company, came to the plant entrance and Waid blocked Jones' access to the door. When Jones reached around Waid to open the door, Waid said, "You had better leave that god damn helmet on if you know what's good for you."[1] Curry, another picket, joined the group and told Jones, "If you go through that door, you are not coming back out of it again."

It should be observed that Oldham, Thompson, Waid and Curry were all placed at the scene during this incident. And, more significantly, none of these refuted the testimony of Jones.

When Jones left the plant that day, he discovered that his motorcycle was definitely not in the same shape it was when he parked it. The front and back tires had been slashed. This damage to the tires cost Jones almost $50 and he had to replace both tires on the motorcycle, which he did not own but had borrowed from a friend. As a result of this incident, Jones decided to stop working for the Company, stating that he "got tired of being harassed and cussed and coffee thrown on me."

About half hour after the incident involving Jones, Myrna Hinds, a nonstriker, was confronted by Oldham and a group of strikers as she attempted to cross the picket line. Oldham asked her if she was going to cross the line and, when she answered in the affirmative, one of the pickets asked her if her husband was a union member. Hinds said that he was and one of the pickets then asked her what her husband's union would think about her crossing the picket line. Hinds, somewhat apprehensive as to what might happen in regard to her husband, went to her supervisor and asked if her crossing the picket line would affect her husband's job security. Her foreman took her to Bechtold, who gave her permission to go home and check with

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[1]At that time Jones was wearing his motorcyle helmet.

her husband on the matter. When she reached home, her husband assured her that he did not think that his union would take any action against him if she crossed the picket line. Thereafter, Hinds' husband brought her to work every morning. On one occasion, Waid took pictures of Hinds and her husband as they drove up to the plant and, as Hinds' husband left a picket stepped out behind the truck and appeared to be taking down the license number of the vehicle.

Later on August 10, following the incidents involving Jones and Hinds, Thompson and another picket, Frank Roden, followed nonstriker Cheatam Scott to his car. Thompson told Scott, who had signed a union card, that he had let the Union down by working. When Scott denied this, Thompson threatened to "whip my . . . ass." As Scott started to drive away in his car, Thompson and Roden began yelling at him and stated that they would be by to talk to him later. The following morning, Scott found that his house had been splattered with paint from a paint bomb made out of a light bulb.[2] On or about August 15, some unidentified persons again visited Scott's house. On this occasion, his automobile was blown out of the garage and totally damaged; the damage to the garage was approximately $800. Scott had no insurance on his automobile. He discussed this incident with a neighbor, who stated that she ran to the door when she heard the blast and observed a car matching the description of Thompson's automobile speeding away. Earlier, she had seen several white men (she and Scott are black) around Scott's house.

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[2]It should here be observed that about 2 days before these incidents Scott had told Oldham that a strike would have no effect on plant operations and that (Scott) would not join in any picketing.

Waid further testified that, on July 7, he had a conversation with Dallas Sutterfield, an inspector directly under Rike's supervision. Waid was "running the automatic" that day, inasmuch as the regular operator was on vacation. A fellow employee, one Leon, "was questioning me as to certain aspects of union membership," and Waid "was yelling them [the answers] back" while Sutterfield was in the area. According to Waid, Sutterfield "told me that I had better hope that the Union got in, because if it didn't, Walter Rike had told him that there were going to be some heads rolling." According to Waid, in his conversation with Leon he alluded to a pension plan, insurance, pay rates and the fact that employees did not get time and a half for overtime on the dual machine operation.

Waid testified that on July 20, shortly after noon, Attorney Mathias and Mr. Uto told Waid that no disciplinary action would be taken against him for engaging in union activity.

C. *The Alleged Intimidatory Conduct and Secondary Boycott Activity*

Clyde Buckner, the terminal manager of Rose in the Tulsa area, testified that on August 9, he and a Rose employee named Herbert Clayton, a city pickup/delivery driver, went to the Company's plant to pick up and deliver some freight. According to Buckner, he and the driver backed into the loading dock and loaded the freight. During that time, about four men were standing around their truck and "hollering at us," calling them "scabs," and they also asked if Rose was paying for their insurance. On this occasion, the left rear tail lights were cut and the right front hydraulic brake line was put out of commission, but Buckner did not see who was responsible for these incidents. Also, a nail had been placed in the tread of

one of the truck's rear tires. After the brake line had been severed, the truck was "cautiously" moved off the street in order to repair the brake line. Buckner testified that as he opened the door on the passengers' side to remove a clip board, he discovered that a burning cigarette underneath the clip board had burned a hole in the seat. He testified that the cost of repairing the truck was $21.66.[3] After this pickup, no additional pickups were made by Rose from the Company's plant. Buckner testified that he had complained to a representative of the Company that additional security was needed at the Rockford plant, stating that he did not wish to make further pickups and deliveries under existing circumstances. According to Bech-told, in view of Buckner's inability to guarantee that the some "sort of thing" would not happen in the future, new shipping arrangements were made. Thereafter, during the strike period, major shipments were made through other freight lines which included the rerouting of shipments in order to use the Chief Line.

The first delivery took place on August 13. This pick-up was handled by two employees of Chief, namely, James Mounce, the assistant safety director, and John Ayres, the terminal manager, inasmuch as the regular drivers had refused to go to Chief's plant and make pickups because they had been advised that a picket line was there. When Mounce and Ayers arrived at the plant at about 4 o'clock, they found that another truck was occupying the space where the pickup was to be made. At about 4:30, the truck was placed at the loading dock and, shortly there-

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[3]Buckner testified that on an earlier occasion Clayton went out to deliver some freight, and that as he backed into the dock a "couple of men" came up and told him that they were on strike and that he should not deliver the freight. Clayton left with the freight and brought it back to Rose's yard.

after, Oldham drove up in a car, walked across the street to where the loading was in progress and held a conference with about 10 pickets. Oldham stated to Mounce, "you're the first one to break our picket, aren't you Teamsters?" At that time, other pickets identified Mounce and Ayers as supervisors. The Chief pickup truck was at the plant something more than an hour, and during that time a brick was thrown at the truck but missed and a sizeable concrete chunk was also thrown and struck the truck. According to Mounce, the strikers kept hollering "boom" and that on one occasion a striker said, "Boom, I just blew your truck up."

Although Oldham was in the vicinity, there is no evidence that he disapproved of or objected to the conduct of the strikers. Employee Wayne Ray testified concerning the conversation during the first attempt by Rose to make a delivery, as he had been assigned by the Company to unload the truck. He identified Thompson as being on the picket line. No unloading occurred, apparently due to the confusion on the picket line and the interference on the part of the pickets. After making some effort to unload, Clayton stated that he would come back later that evening, and testified that about half of the pickets carried picket signs. According to Ray, Clayton got out of the truck and went into the plant. Strikers stood around him and, as Ray testified, they were "trying to get him not to come in." He also testified that the keys were taken from the Rose truck and that the strikers would not let Clayton have them back as he prepared to get into his truck. The strikers, according to Ray, told the driver that they would give him his keys if he would not come back. On cross-examination, the driver was told by the pickets "that they would hand his head back to him next time, if he came."

In the conversation between Rike and Thompson

"something was said about taking a page off of the bulletin board that was the original page" from the Company's "blue book." Thompson asked why Rike had removed the page and Rike replied that he had taken it down because in addition to the original printing there was some hand writing on the page, in somewhat vulgar language. According to Rike, nothing could be posted on the bulletin board by employees without prior authorization. Rike denied that Thompson told him that he was violating the law by showing him the contract book, or that Rike told Thompson that he had enough on five employees to have them discharged for union activities.

Rike related that Thompson, Curry and Waid had been active in prior union campaigns, and that he had learned of the activity of Curry and Waid from their testimony at the present hearing. He denied that he had ever told any employee that he had enough on five employees to terminate them for union activity. Rike denied that he had ever told Sutterfield or anyone else that if the Union got in heads would roll. He did testify, however, that he frequently made a "joke" to the effect that "if the Union comes in, my job will be easier," because, being a working foreman, if the Union came in it would not allow the foreman to perform production work. Rike denied that he had observed Waid solicit employee Johnson.

Assistant Plant Superintendent Uto, who had occupied that position for some 18 or 20 months, had previously been employed as a shop foreman in the machine shop for some 2½ years. In June of the current year Uto attended a seminar at the Tulsa Junior College for some 5 weeks dealing with labor relations problems, and he testified that he had been involved in two union campaigns while employed by the Company. He identified the bulletin that he had posted, stating he first saw it around the middle of August. About July 20, it came to his attention that

representatives of the Union had alleged that certain supervisors of the Company had been engaging in unfair labor practices. He was informed of this by Mr. Bechtold and the Company's attorney, Mrs. Matthies. Upon receiving this information, he went down to the plant and asked one John Wilkins, an employee, if he would come up to Mr. Bechtold's office. Uto went to Wilkins because he had been informed that Wilkins was "one of the people that felt like that he had been threatened." Wilkins told Uto that he would not come unless the Union representative was present at that meeting.

During the meeting, Mrs. Matthies told the approximately five employees that she had heard that they had felt that they had been threatened by Company supervisors and that she wished to assure them that this was no "doing of the Company and that they would take action on this if it were true, and that they assured them that they had a right to organize and could not be interfered with for trying to organize, could not be fired from the Company for this."

Uto testified that on August 9, between the hours of 11:30 and 12:30, he was at the Rockford plant site. During that time he had occasion to see Oldham at about 12:15 in the office lobby. About 12:15 Uto was in Mr. Bechtold's office when an office employee, Al Dunn, knocked on the door. Dunn stated that "there's a group of Union people in the lobby," and Mr. Bechtold called the Company Attorney. Uto went down to the lobby, introduced himself and told the employees, "if you have problems, . . . I suggest you take it through proper channels with your immediate supervisors; and if this can't be resolved in this form, then I will see you as individuals or on individual terms." When Uto returned to the place where employees and Oldham were gathered, he told Oldham what he had

told Bechtold and Oldham stated, "Okay. Consider yourself struck."

Foreman Rike, who had worked for the Company a little over 23 years, and as foreman for the past 9 years, has been a member of the Machinist Union since 1951. He testified that in the last 10 years there have been five attempts to organize the Company's employees and that, before each of these campaigns, he and other supervisors attended meetings with the Company's attorney. He testified that the supervisors were informed of employees' rights to organize and that supervisors could not discriminate against them, or threaten, interfere with, harass, or spy upon employees. Approximately 2 years before the hearing, Rike attended a management course in which the Norris contract was explained and the rights of employees were outlined. Rike also had taken a correspondence course which dealt with management and covered the basic rights of unions. For about 8 years he has been a member of the Tulsa Management Club and has attended lectures and seminars conducted by that organization concerning labor relations. Rike testified that prior to the present proceeding no labor organization or individual had filed any charges with the Board alleging that he or any supervisor of the Company had committed an unfair labor practice. Rike, who works under the immediate supervision of Chief Engineer Nyland Shelton, had three inspectors under his supervision. He has no supervisory authority over any employees of the Company other than the three inspectors.

Rike testified that the Company has a progressive discipline policy which he described as consisting first of an oral warning, then a written warning and then suspension, followed by termination. With respect to the inspection department, suspensions and discharges require the

approval of Shelton and Bechtold, but no approval is required for oral warnings.

Rike denied that he told Curry that people who were pushing the Union or working for the Union would be fired if the Union failed to get in. Moreover, he stated that he had never heard any supervisor or member of management tell Curry or any other employee that union supporters would be terminated or discriminated against because of their activities on behalf of the Union. Rike testified that he and Curry had several things in common and related that both of them were farm boys and both own horses and that they talk about horses and farming. Also, Curry and Rike attended an American Red Cross course and advanced courses in first-aid. Rike is safety director for the Company and Curry is a member of the safety committee. He related that in the foregoing capacities he and Curry enjoyed a very good work relationship.

According to Rike, in the early part of August he had occasion to visit Curry at the latter's machine. Also present was Machine Inspector Sutterfield and Leadman Jimmy Jones. Sometime earlier, Sutterfield had informed Rike that he was having some quality problems on Curry's machine and asked Rike if he would go over and speak to Curry. Rike answered that he preferred that Sutterfield work through Jones first and that if the latter could not take care of the problem Rike would go over there with the leadman. That is what happened. While at the machine, Rike spoke mainly to Jones. The incident was not recorded in Curry's personnel file and Rike testified he had no further "problems" concerning the quality of Curry's work. Rike denied that he ever discussed the Union with Curry.

Concerning the testimony of Thompson to the effect that Thompson told Rike that he and others thought it was against the law for Rike to show employees the contract

book and that Rike replied that if the employees were going to play that way he had enough on five of them to cause their termination for union activity, Rike denied that any such incident occurred. He testified, however, that early in July he did have a conversation with Thompson near his machine.

D. *Discussion and Conclusions*

Counsel for the Respondent Employer contends that the Union's strike was a "violent one," involving "violence to nonstriking employees, rock throwing, bomb threats, damage to trucks, the bombing of a nonstriking employee's car, tire-slashing, and other inconceivable acts."

After some 37 years in various aspects of labor relations, representing the Government, employers, unions and for the last 12 years, in the position I now occupy, I am unable to categorize the events in this case as amounting to a "violent" strike. In the preceding sections I have attempted to set forth the testimony in an objective fashion. In my view what emerges is not a "campaign of terror against nonunion employees and suppliers," but a rather "garden variety" of incidents not unusual in a labor dispute involving a strike. In substantial part, the incidents of a "violent" character are not established to have been committed by representatives or agents of the Union.[4] Certainly, a fair appraisal of the evidence does not, in my opinion, warrant characterizing the Union's charges in Case No. 16-CA-5224 as "nothing more than fabrications, designed to cast a smoke screen over the Union's unlawful actions." In substance, Respondent Company's

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[4]For example, the persons who cut the rear tail light of the Company's truck on August 9 and put out of commission the right front hydraulic brake line, were not identified, as Buckner did not see who committed these acts.

counsel appears to me to be alleging that the Regional Director in issuing the complaint, after investigating the Union's charges, acted in a "frivolous" manner, with the result that "costs and attorney fees [should be] granted" the Respondent Employer.

In my view, the relief sought by the Respondent Employer — including "either an order barring the Union from seeking voluntary recognition as the representative of the affected employees for several years, or an order directing a remedial election to determine the wishes of the employees as to the representation by the Union" — is not supported by the facts or appropriate. Nor do I regard this case as warranting the award to the Respondent Company of "costs of attorney fees' under the *Tidee* rule,[5] or backpay for employees "intimidated by the picket line violence."

To conclude, I find that Rike told three union supporters that they would be discharged; while I am of the view that he was talking to them in a friendly manner and on the basis of his long union background and relationship with them, I nontheless believe and find that he made the remarks attributed to him. These remarks, I find, were violative of Section 8(a)(1) of the Act.

I further find that the Union engaged in an unlawful secondary boycott, thereby violating Sections 8(b)(1)(A) and 8(b)(4)(i), (ii)(B) of the Act.

Thus, on August 14 when Buckner and Clayton drove to the Rockford plant to make a pickup, pickets surrounded the truck, engaged in name calling, and, in what to me appears a threatening vein, inquired if Rose was paying their insurance. I think it reasonable to infer that

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[5] *Tidee Products, Inc.*, 194 NLRB 1234 on remad from 426 F(2d) 1243 (C.A.D.C. 1970), cert. den., 400 U.S. 950 (1970). In my view, the litigation here undertaken was not "frivolous" or "clearly unwarranted."

strikers caused the damage to the truck, and I so find. After Buckner told Bechtold that his concern "would not return unless" Bechtold "could guarantee that this same sort of thing would not happen in the future," new shipping arrangements were made. Moreover, Chief's rank-and-file drivers refused to go to the Dover plant to make pickups. In addition, on August 13, when Chief's supervisors Mounce and Ayres came to the Dover plant Oldham came to the plant, conferred with some 10 pickets, came to the Dover truck and he or another striker stated that Mounce and Ayres were the first "to break our picket" and, during the period the truck was there a brick and a concrete chunk were thrown at the truck. Oldham witnessed some of this conduct but, so far as appears, made no objection and took no steps to stop it.

As we have seen, Waid told employee Jones, as he returned from lunch wearing a motorcycle helmet, that Jones "better leave that god damn helmet on if you know what's good for you." Further, Curry told Jones, as the latter was entering the plant, "If you go through that door, you're not coming back out of it again."

Finally, I conclude that the damage to Jones' tires, amounting to some $51, was caused by strikers and that the damage to employee Scott's home and automobile must also be attributed to the strikers.[6]

As I view the matter a substantial part of the Union's activity was directed at neutral employers and their employees, and cannot, therefore, be regarded as lawful primary picketing. I conclude that an object of the picketing was not only to support a primary picket line but also to enmesh the employees of secondary employers to refuse to perform services for their employers and by such means,

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[6] Thus, a neighbor, so Scott testified, told him she had seen some "white guys" around his house and one of them drove a car very similar to Thompson's.

force their employers to cease doing business with Dover, the primary employer. As we have seen, as a result of the Union's tactics Rose refused to do further business with Dover and Chief refused unless security was augmented.

Upon the basis of the foregoing findings of fact, I conclude that the Union engaged in acts violative of Sections 8(b)(1)(A) and 8(b)(4)(i), (ii)(B) of the Act.

Conclusions of Law

1. Dover Corporation, Norris Division, Tulsa, Oklahoma, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America AFL CIO CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Company engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The Respondent Union engaged in unfair labor practices within the meaning of Sections 8(b)(1)(A) and 8(b)(4)(i), (ii)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and the Conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

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[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

ORDER

(A) Respondent, Dover Corporation, Norris Division, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively warning employees that if the Union was successful in its organizational program a substantial number of union adherents would be dismissed.

(b) Coercively warning employees that if they continue their union activity the Respondent possessed sufficient grounds for discharging them.

(c) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

(d) Post at its plants in Tulsa, Oklahoma, copies of the attached notice marked "Appendix A."[8] Copies of said notice, on forms to be furnished by the Regional Director for Region 16 shall, after being duly signed by an authorized representative, be posted by the Respondent Company immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 16, in writing, within 20 days from the date of receipt of this

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[8] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Decision, what steps the Respondent Company has taken to comply herewith.

(B). Respondent, United Steelworkers of America, AFL–CIO–CLC, its officers, agents, successors, and assigns, shall:

1. Cease and desist:

(a) Inducing or encouraging employees of Chief and Rose, and of any other persons engaged in commerce or an industry affecting commerce to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods. articles, materials, or commodities or to perform services for their respective employers.

(b) Threatening, coercing or restraining supervisors of Chief and Rose, or other persons engaged in commerce or an industry affecting commerce with harm to their person or equipment if they continued to do business at the plants of Dover in Tulsa, Oklahoma.

(c) Inducing or encouraging employees of Rose or any other persons engaged in commerce or an industry affecting commerce, by picketing, requests, appeals, orders, instructions or any other means, to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform services for their respective employers.

(d) In any other manner restraining or coercing said employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Mail a copy of the attached notice marked

"Appendix B"[9] to each of its members and post copies thereof at its business office and meeting hall in Tulsa, Oklahoma, copies of said notice, on forms provided by the Regional Director for the Sixteenth Region, after being duly signed by the Union's official representative shall, immediately upon receipt thereof, be mailed to each member, posted and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken to insure that such notice is not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for the Sixteenth Region for posting by Dover, Chief and Rose at all locations where notices to employees are customarily posted, if said companies are willing to do so.

(c) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Decisions and Recommended Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C., Dec. 17, 1973.

s/s Ivar H. Peterson
Administrative Law Judge

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[9]In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727 (9-69)

APPENDIX A

JD-749-73

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT coercively warn employees that if the Union is successful in its organizational program a substantial number of adherents of the Union will be dismissed.

WE WILL NOT coercively warn employees that if they continue their activity in behalf of the Union we have sufficient grounds for discharging them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

DOVER CORPORATION
NORRIS DIVISION
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8-A-24, 819 Taylor Street, Fort Worth, Texas 65102 (Tel. No. 817-334-2921).

FORM NLRB-4726 (6-71)

APPENDIX B

JD-749-73

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT induce or encourage employees of CHIEF FREIGHT LINES, INC., or J. H. ROSE TRUCK LINES, INC., or any other person engaged in interstate commerce to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform services for their respective employers, in order to force Chief, Rose and other employers to cease doing business with DOVER CORPORATION, NORRIS DIVISION or other persons.

WE WILL NOT threaten, coerce or restrain supervisors or any other employees, of Chief and Rose, or of other persons, with harm to their person or equipment if they continued to do business at the plants of Dover in Tulsa, Oklahoma.

WE WILL NOT in any other manner restrain or coerce the said employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8-A-24 819 Taylor Street, Fort Worth, Texas 65102 (Tel. No. 817-334-2921).

APPENDIX B

APPENDIX B

(PUBLISH)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,
v. NO. 74-1577
DOVER CORPORATION, NORRIS DIVISION,
Respondent,

ON APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
(NLRB Case No. 16-CA-5224)

Elinor Hadley Stillman, Attorney, National Labor Relations Board (William Watcher, Attorney, National Labor Relations Board, and Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, on the brief) for Petitioner

Mary T. Matthies, Tulsa, Oklahoma (Richard L. Barnes of Kothe and Nichols, Inc., Tulsa, Oklahoma, on the brief) for Respondent

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Before HILL, HOLLOWAY and BARRETT, Circuit Judges

HOLLOWAY, Circuit Judge

The National Labor Relations Board applies for enforcement of that part of its order entered in Dover Corporation, Norris Division, 211 NLRB No. 98, finding that the Dover Corporation violated § 8(a)(1) of the National Labor Relations Act, 29 USCA § 158(a)(1), and entering an order to cease and desist and to post a notice, *inter alia*.[1]

The Board found that Dover violated § 8(a)(1) by virtue of the threatening statements of a supervisor, Rike, during an organizational campaign and issued a remedial order. In opposing enforcement of the order Dover essentially argues that (1) there is insufficient evidence to establish that coercive statements were made; (2) there is insufficient evidence to establish that the employees considered the statements to be authorized by top management or capable of being carried out by the supervisor, Rike, who allegedly made the statements; (3) there is no evidence to support a finding that employees were restrained in the exercise of protected activities by the alleged statements; (4) the Board has failed to establish an ascertainable standard by which an employer can remedy unauthorized misconduct; and (5) the order of the Board is not appropriate for present enforcement. We will first outline the facts in our record pertaining to the §8(a)(1) charge and then address the principal arguments made.

In May, 1973[2] the United Steelworkers of America began an organizing campaign at Dover's Rockford Street plant, in Tulsa, Oklahoma. At that time Rike was foreman

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[1]The order also concerned charges filed by Dover against the Union involved in this case, United Steelworkers of America, for violation of § 8(b)(1) and 8(b)(4). Since the Board received voluntary compliance by the union as to the part of the order dealing with the only unfair labor practices by the union found to have occurred, in violation of § 8(b)(1), we are concerned here only with the findings pertaining to employer practices.

[2]All dates hereafter refer to 1973, unless otherwise noted.

of inspection supervising three inspectors at the plant.[3] On July 13, Rike approached employee Thompson and engaged him in a discussion, comparing the employee benefits of the Rockford Street plant with the benefits of the Norris plant, another Dover Facility which was previously unionized. Rike, holding a document purporting to be a Norris contract book, said to Thompson that he didn't see "why you guys want a union in here, because you have better benefits and wages than the Norris plant does." Apparently the contract book which Rike showed Thompson was an old contract which had expired. Later that day Thompson told Rike that he and other employees objected to Rike's using the old contract. Rike was said to have replied, "If you guys are going to play this way, I have enough on the five of you to get you discharged for union activities." Rike denies having this second conversation with Thompson, but the Judge credited Thompson's version (A. 17, 19).

Shortly after this incident Mr. Bechtold, a Vice-President of Dover, learned that several employees felt they had been threatened with reprisals for union activity. He directed Dover's attorney to contact the employees and to investigate the matter. On July 20, the Assistant Plant Superintendent and the company attorney spoke with several employees, including Thompson, and assured them that any threats were not the doing of the company; that the company would take action on this matter if it were true; and they assured the employees that they had a right to organize and could not be interfered with for trying to organize, nor could they be fired from the company. Apparently neither Rike nor the prior incident were specifically mentioned during this conversation. On the

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[3]The status of Rike as a supervisor within the meaning of the Act was admitted in Dover's answer to the complaint (A. 50-52).

same day, July 20, the company posted a notice in the plant, which read (A. 55-56):

NOTICE TO EMPLOYEES

There seems to have been some question recently as to who is a supervisor in the plant and who is an employee. As many of you who have been here during past union campaigns will remember, persons who are supervisors are somewhat limited in what they can say about unions.

Supervisors are forbidden by the law to make any promises as to future rewards in order to get an employee to decide to join or not join a union. They are also forbidden to threaten or harass any employee who campaigns either for or against a union.

Our supervisors in the plant, who are named below, have been informed that they are not to interfere with the rights of our employees to campaign either for or against unions. This does not mean that these supervisors cannot enforce our rules that all campaigning should be done on non-working time.

Our plant supervisors are:

W. A. Rike
G. T. Boyce
F. R. Hawkins
B. L. Uto
W. H. Mitchell
G. W. Sullivan

Leadmen are not considered by this company to be supervisors. While they are among our most valuable employees because of their experience in the way we work here at O'Bannon, they are *not* foremen.

Leadmen do not have the authority to hire any employees, or to transfer, suspend, lay off or recall any of their fellow workers. Leadmen cannot discharge, reward or discipline employees, nor may they make independent decisions as to work assignments of any other employees.

Therefore, any statements made by any leadmen either for or against unions are their own opinions. The only people who can make statements on behalf of the company are the supervisors named above.

I hope this notice will make these matters clear. If you have any questions, please come to your supervisor or to me.

s/s E.L. Bechtold

ELB:ja

Thompson testified that assurances had been given him by Dover's attorney, with the assistant plant superintendent, Uto, present. Thompson agreed he was told they "were there to assure [him] that there would be no reprisals against [him] for engaging in union activity . . ." Thompson continued his union activity and was still working at the plant at the time of the hearing (A. 93-94).

Employee Curry testified that Rike approached him on August 8 at Curry's work station and told him "that the people who were pushing the union, working for the union, would probably be fired if the union failed to get in." Rike admitted having a conversation with Curry sometime in early August, but expressly denied that he ever told Curry that the people working for the Union would be fired. The Administrative Law Judge credited Curry's testimony (A. 6, 19). Curry testified that he had read the posted notice and, when asked if he believed, it, he replied that he ". . . had no reason to disbelieve it . . ." (A. 80).

Essentially the Judge found that Rike did tell three union supporters they would be discharged;[4] that while he was talking in a friendly manner and on the basis of

[4]As noted below, the Board majority accepted the findings of violations as to only two employees — Curry and Thompson. They rejected as unsupported the Judge's finding of a violation as to employee Waid, pointing out that there was no probative evidence to support that finding.

his long union background and relationship with them, he was found to have made the remarks, which violated §8(a)(1) (A. 19). He also found the Dover's attorney had met with approximately five employees and gave assurances that threats were no "doing of the company" and that "they had a right to organize and could not be interfered with for trying to organize, could not be fired from the company for this." (A. 14). He nevertheless found an 8(a)(1) violation and recommended a remedial order.

The Board, with Chairman Miller dissenting, agreed with the finding that the conversations between Rike, and Curry and Thompson were violative of § 8(a)(1). The Board rejected as unsupported the finding of an additional similar incident with employee Waid. Chairman Miller pointed to the notices and assurances and said he could not infer that the employees would assume Rike was speaking for the company or in a position to carry out the threats he made, and would not hold the company responsible for the minor supervisor's remarks outside his apparent authority (A. 40).

The Board majority found, however, that Rike's authority was such that it was not difficult to understand why employees might well be apprehensive about arousing his enmity and that the supposed attempt to counteract Rike's statements were "little more than some general bromides by the Company's counsel about the Company's good aims and intentions." (A. 41). The majority found a violation of § 8(a)(1) and a remedial order was entered.

I

The §8(a)(1) Violations

If made as the Judge found, we agree that the statements by Supervisor Rike are coercive and threatening and sufficient under the decisions in Serv-Air, Inc. v. NLRB, 395 F.2d 557, 565 (10th Cir.), cert. denied, 393 U.S. 840

and Betts Baking Co. v. NLRB, 380 F.2d 199, 201-02 (10th Cir.) to sustain a finding of § 8(a)(1) violation. For several reasons Dover argues that substantial evidence does not support the Board's findings.

First, Dover says that the credibility findings made by the Judge and sustained by the Board should be overturned, pointing to several circumstances undermining the findings. We are not persuaded. Credibility findings are peculiarly within the province of the hearing officer and the Board and are ordinarily entitled to acceptance on review. N.L.R.B. v. Wylie Mfg. Co., 417 F.2d 192, 194 (10th Cir.), cert. denied, 397 U.S. 913. Dover argues for an exception to this rule, emphasizing that the Administrative Law Judge should not have credited Thompson and Curry as to occurrence of the threatening incidents since the Judge did not credit their testimony as it pertained to the unfair practices charged against the union (see n. 1, supra). We disagree. The Judge could credit some testimony of a witness although he disbelieved other testimony from the same witness. See *Wylie,* supra, 417 F.2d at 194.

Dover also says that the credibility of Rike is strengthened by the proof that he had previously received detailed instructions on labor relations which taught him that supervisors could not interfere with employees during union organizing campaigns (Brief for Dover Corp., 11-12). The argument that it is improbable that a supervisor would violate the orders of his superiors goes to the weight of his testimony. See *Wylie,* supra, 417 F.2d at 194. It was for the Judge and then the Board to weigh the testimony. Accordingly, we sustain the findings resolving the conflicts in the proof.

Second, Dover argues that there was insufficient evidence that the employees considered Rike's statements to be authorized by top management or capable of being carried out by Rike (Brief for Dover Corp., 13-20). Dover is

not arguing that Rike is not a statutory supervisor within the meaning of § 2(11) of the Act, 29 USCA § 152(11), which it admits.[5] Rather, Dover says that Rike did not have the authority to fire either Thompson or Curry and that he had no direct supervision over their work so that therefore there would be no reason for Thompson or Curry to view any statement by Rike as threatening or intimidating. Furthermore, Dover argues that any coercion or intimidation caused by Rike's statements was negated by the oral assurances against reprisal given to several employees on July 13 and the written notice of July 20. These were points made by Chairman Miller in dissent.

Deciding whether particular statements amount to threats or coercion involves an exercise of judgment and is a matter initially for the Board. In making that determination it is the peculiar province of the Board to draw permissible inferences from credible testimony. N.L.R.B. v. Gold Spot Dairy, Inc., 417 F.2d 761, 762, (10th Cir.). That a supervisor lacks the power to hire or fire does not preclude the Board from finding unfair labor practices attributable to the employer arising from the supervisor's conduct. See NLRB v. Link-Belt Co., 311 U.S. 584, 599. The employer is responsible for the acts of a supervisor when employees would have just cause to believe that he was acting for and on behalf of the company. Furr's Inc. v. NLRB, 381 F.2d 562, 566 (10th Cir.), cert. denied, 389 U.S. 840.

The Administrative Law Judge specifically found that Rike had no supervisory authority over any of the company employees other than three inspectors. Nonetheless, he found the statements violative of § 8(a)(1). The Board

[5]As noted earlier, Dover's answer to the complaint issued by the General Counsel admitted that Rike was a statutory supervisor (A. 50-52).

found that Rike was not a minor supervisor and that he did have some authority over the threatened employees (A. 40). The Board noted that Curry testified that all employee work required Rike's "O.K." and that Rike did not disagree. The Board also noted that the inspectors under Rike's control could require employees to redo their work. Thus the Board concluded that employees might well be apprehensive about arousing Rike's enmity.

On this basis the Board found that the statements made by Rike were coercive and therefore violative of § 8(a)(1).[6] We accept this conclusion by the Board as supported by credible and substantial proof on which the Board could rely.

Dover argues further that any coercive effect of the statements by Rike was offset by reassurances given to all employees, either orally or through the posted notice. The Board rejected these attempts to counteract the coercive statements as mere "general bromides" by the company about its aims and good intentions (A. 41).

We feel the characterization by the Board was not a fair one in view of the extent of the company's efforts and their apparently reassuring effect on at least Thompson and Curry. We are impressed by the fact that the oral assurances given to several employees, whose names had been furnished by the union, acknowledged reports of supervisor coercion and gave assurances that remedial action would be taken and that no reprisals or firing for union activity would occur. These statements were more specific than the general statements rejected as inadequate in other

[6]The Board also noted that Rike was never disciplined or rebuked because of his statement (A. 41). We do not perceive the evidence in the record which led the Board to make this observation, but this lack of support does not undermine the other findings and conclusions.

cases.[7] Nevertheless, the remarks by Rike found to have been made were strong ones and it is for the Board to assess the curative effect of the company's remedial efforts. *Furr's Inc.*, supra, at 567. We cannot say its judgment was "clear error" on the whole record.

Third, Dover argues that neither Thompson or Curry were actually deterred or coerced in their union activities; that both remain active union advocates; and that neither has suffered any reprisal on account of his organizing activities. We agree that the actual effect of the statements on the employees is relevant, but it is not dispositive. See Boeing Airplane Co. v. NLRB, 140 F.2d 423, 434 (10th Cir.). "Statements in violation of the Act do not become permissible because they fail to dissuade some of the employees from union adherence." *Wylie*, supra, 417 F.2d at 195.

Finally, Dover argues that the Board's findings depart from a previous Board policy announced in Morganton Full Fashion Hosiery Co., 107 NLRB No. 312, where the Board found that no remedy was necessary due to a few isolated threats by overzealous minor supervisory personnel.

Morganton concerned alleged unfair practices in the context of a challenge to a representation election and the propriety of setting aside the election results. Dover argues that the Board is more likely to find unfair practices in a case involving an election challenge than in a case where the only issue is whether unfair practices occurred, citing Dal Tex Optical Co., 137 NLRB No. 189. Hence Dover says that if isolated incidents were insufficient to amount

[7]See, *e.g.*, *Furr's Inc.*, supra, 381 F.2d 567: see also NLRB v. Gerbes Super Markets, Inc., 436 F.2d 19, 21 (8th Cir.); United States Rubber Co. v. NLRB, 384 F.2d 660 (5th Cir.); N.L.R.B. v. Austin Powder Co., 350 F.2d 973, 976 (6th Cir.); A.P. Green Fire Brick Co. v. NLRB, 326 F.2d 910 (8th Cir.).

to unfair practices in *Morganton*, the isolated instances in the present case are clearly insufficient to amount to unfair practices.

We need not go into the nuances of the rules said to apply in various situations. In the first place, we are not persuaded that the *Morganton* decision of the Board established any clear "rule" concerning orders being unnecessary where isolated incidents or only a small number of improper statements are involved. We are persuaded that the determination concerning a remedial order turns on the facts, under Board decisions and controlling court decisions. The Board must decide whether the incidents found to have occurred — few or many — amounted to unlawful coercion. Since we cannot say the Board's findings and its assessment of the need for an order were "clearly in error," we uphold the Board's determinations. Gold Spot Dairy, Inc., *supra*, 417 F.2d at 764; A. P. Green Fire Brick Co. v. NLRB, 326 F.2d 910, 914 (8th Cir.).

II

Enforcement of the Board's order

Dover objects to enforcement of the Board's order for several reasons.

First, Dover argues that the Board has failed to establish an ascertainable standard whereby an employer can remedy unauthorized misconduct. The complaint of lack of a hard and fast rule is not persuasive. As noted, for obvious reasons the finding whether unlawful coercion occurred and the terms of any remedial order must depend on the particular factual setting, and the efficacy of notices and assurances to remedy misconduct must likewise be judged by the circumstances. See A. P. Green Fire Brick Co. v. NLRB, *supra*, 326 F.2d at 914; NLRB v. Gerbes Super Markets, Inc., *supra*, 436 F.2d at 21. We are reminded

that ". . . the relation of remedy to policy is peculiarly a matter for administrative competence . . ." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194; see also Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540. We cannot agree that the Board's findings and order are repugnant to policies of the Act or unsupported by the record.

Further, Dover contends that enforcement of the order is no longer appropriate since the Board consented to a representation election which has occurred, with certification of its results adverse to the union, and passage of time. Dover says that since the Board waived the "blocking effect" of an unfair labor practice charge, enforcement would be meaningless. NLRB v. Raytheon Co., 398 U.S. 25, involved a similar situation and upheld the Board's judgment that a remedial order was entered after an earlier order setting aside an election and ordering the employer to cease and desist from unlawful conduct. Occurrence of an intervening election and its certification, showing compliance during the latter election, did not render the cause moot or make enforcement of the cease and desist provision improper. Id. at 27. We likewise sustain the Board's determination here, despite the developments that are cited.

We have, however, examined the order in light of the arguments made by Dover to determine whether any modification is proper. See May Stores Co. v. NLRB, 326 U.S. 376, 392. In order that its provisions fairly take account of the fact that the election and certification occurred, a minor modification of the order is made as shown in the margin.[8]

As modified, the order will be enforced.

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[8]Paragraph 1(a) of the present order prohibits:

> Coercively warning employees that if the Union was successful in its organizational program a substantial number of union adherents would be dismissed. (A. 42)

Continued on next page

No. 74-1577 — NLRB v. DOVER CORPORATION, NORRIS DIVISION

BARRETT, Circuit Judge, concurring:

I concur in light of the authorities supportive of the opinion and the Board's apparent "well settled" rule that interference, restraint and coercion under Section 8(a)(1) of the Act does not turn on an employer's good faith, lack of guilty scienter or motive.

I feel that the employer in the case at bar did everything reasonably or practicably possible to avoid a Section 8(a)(1) violation. The Board's "well settled" test does, in my judgment, impose an obligation on the employing company to insure or guarantee that none of its supervisory personnel shall say or do anything threatening or coercive. This rule does, in effect, impose the doctrine of *strict liability* upon the employer, regardless of good faith efforts which are evidenced in this record. There is nothing fair about the application of such a rule leading to a finding of an unfair labor practice.

Footnote 8 continued

The notice presently prescribed by the Board states:

> WE WILL NOT coercively warn employees that if the Union is successful in its organizational program a substantial number of adherents of the Union will be dismissed. (A. 45)

Paragraph 1(a) is modified to prohibit:

> Coercively warning employees that a substantial number of union adherents would be dismissed depending on the outcome of a Union organizational program.

Likewise, the language of the first paragraph of the notice is modified to read:

> WE WILL NOT coercively warn employees that a substantial number of adherents of the Union will be dismissed depending on the outcome of a Union organizational program.

APPENDIX C

APPENDIX C

FILED United States Court of Appeals Tenth Circuit,
JUN 4, 1976; HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v. No. 74-1577
DOVER CORPORATION —,
NORRIS DIVISION,
Respondent.

JUDGMENT

Before: HILL, HOLLOWAY and BARRETT, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Dover Corporation, Norris Division, Tulsa, Oklahoma, its officers, agents, successors, and assigns on June 25, 1974. The Court heard argument of respective counsel on May 19, 1975, and has considered the briefs and transcript of record filed in this cause. On April 12, 1976, the Court, being fully advised in the premises handed down its decision enforcing the Board's Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Dover, Corporation, Norris Division, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively warning employees that a substantial number of union adherents would be dismissed depending on the outcome of a Union Organizational program.

(b) Coercively warning employees that if they continue their union activity the Respondent possessed sufficient grounds for discharging them.

(c) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action:

(a) Post at its plant at 400 South Rockford Street in Tulsa, Oklahoma, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 16, (Fort Worth, Texas) of the National Labor Relations Board after being duly signed by an authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent Company has taken to comply herewith.

s/s William J. Holloway, Jr.
Judge, United States Court of
Appeals for the Tenth Circuit
DATED: June 2, 1976

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
s/s Linda A. Hall
Deputy Clerk

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER, AS MODIFIED, OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT coercively warn employees that a substantial number of adherents of the Union will be dismissed depending on the outcome of a Union organizational program.

WE WILL NOT coercively warn employees that if they continue their activity in behalf of the Union we have sufficient grounds for discharging them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

DOVER CORPORATION,
NORRIS DIVISION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 8A24, 819 Taylor Street, Fort Worth, Texas 76102, Telephone 817-334-2921.

APPENDIX D

APPENDIX D

United States Court of Appeals
TENTH CIRCUIT
OFFICE OF THE CLERK
480 UNITED STATES COURTHOUSE
DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

TELEPHONE
303-837-2123

May 19, 1976

Ms. Mary T. Matthies
Kothe, Nichols & Wolfe
Attorneys at Law
124 East Fourth Street
Tulsa, Oklahoma 74103

Re: No. 74-1577
National Labor Relations Board vs.
Dover Corporation, Norris Division

Dear Ms. Matthies:

While I am uncertain as to the state of case law regarding this unusual situation, it is my understanding of the provisions of Rule 19 that our final judgment is entered in this appeal when, and only when, the Court adopts the proposed judgment of the N.L.R.B.

Our Court's action in denying rehearing may be an indication that it will soon approve the proposed judgment and direct its entry. Until it does so, the Clerk thinks the final judgment has not entered and will not issue the mandate until it does enter.

You are aware that under both Supreme Court Rule 12 and Rule 21, the automatic filing of certiorari records is no longer required and, we are informed by the Supreme Court, no longer desired unless and until certiorari is granted. In current practice, we recommend to counsel that they do not order the certiorari record immediately, but await the time when the Supreme Court notifies us that they desire the record to be forwarded. At that time, on behalf of the petitioner, we will prepare such a record, forward it to the Supreme Court and bill the attorney for the service. Please let us hear from you.

Very truly yours,

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

HKP:lah

APPENDIX E

APPENDIX E

SUBCHAPTER II — NATIONAL LABOR RELATIONS

§ 152. Definitions

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101. 61 Stat. 137.

§ 160. Prevention of unfair labor practices — Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though some cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial

statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States,

adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged,

or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agency, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in

or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging

that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) or section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within

any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein

shall apply to charges with respect to section 158(b) (4) (D) of this title.

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (*l*) of this section.

Supreme Court of the District of Columbia was changed to "District Court of the United States for the District of Columbia" by Act June 25, 1936.

Court of Appeals of the District of Columbia was changed to United States Court of Appeals for the District of Columbia by Act June 7, 1934, c. 426, 48 Stat. 926.

Effective Date of 1959 Amendment. Amendment of section by Pub.L. 86–257 effective sixty days after Sept. 14, 1959, see section 707 of Pub.L. 86–257, set out as a note under section 153 of this title.

Effective Date of 1947 Amendment Effective date of Act June 23, 1947, see note set out under section 151 of this title.

Communist Organizations, and Members. Prohibitions placed on Communist organizations, and members thereof, with respect to labor, see chapter 23 of Title 50, War and National Defense, particularly sections 782(4A), 784, 792a and 841 to 844 of that title.

Legislative History. For legislative history and purpose of Act June 23, 1947, see 1947 U.S.Code Cong.Service, p. 1135. See, also, Act May 24, 1949, 1949 U.S.Code Cong.Service, p. 1248; Pub.L. 85–791, 1958 U.S.Code Cong. and Adm.News, p. 3996; Pub.L. 86–257, 1959 U.S.Code Cong. and Adm.News, p. 2318.

Cross References

Actions by and against labor organizations, see section 185 of this title.

Rules and regulations of the National Labor Relations Board, see Appendix of this title.

Strikes subject to injunction, see section 178 of this title.

Time for application for writ of certiorari, see section 2101 of Title 28, Judiciary and Judicial Procedure.

Federal Rules of Civil Procedure

Application of rules, see rule 81, Title 28, Judiciary and Judicial Procedure.

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No. 76-320

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOVER CORPORATION, NORRIS DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45a-57a)[1] is reported at 535 F. 2d 1205. The National Labor Relations Board's decision and order (Pet. App. 1a-43a) are reported at 211 NLRB 955.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a-60a) was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." refers to the appendix to the petition and "A." to the joint appendix to the briefs in the court of appeals.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's finding that a company violated Section 8(a)(1) of the National Labor Relations Act because it did not adequately repudiate threats of discharge for union activity made by a company supervisor to two employees.

2. Whether, in the circumstances of this case, the cease-and-desist order issued by the Board was appropriate.

STATUTE INVOLVED

Most of the relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set forth at Pet. App. 65a-73a. The following provisions are also relevant:

Section 8.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

Section 7.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activies * * *.

STATEMENT

In May 1973, a union began an organizing campaign at one of petitioner's manufacturing plants in the area of Tulsa, Oklahoma (Pet. App. 46a; A. 67-68, 143). On July 13, Walter Rike, a Company supervisor, said to employee Charles Thompson at his workplace, "I don't see why you guys want a union in here, because you have better benefits and wages than the Norris plant does." The Norris facility, also in the Tulsa area, is unionized. Rike was holding in his hand a booklet which appeared to Thompson to be an expired contract from the other plant. Later that day, Thompson told Rike that he and other employees objected to Rike's using the expired contract. Rike replied, "If you guys are going to play this way, I have enough on the five of you to get you discharged for union activities." (Pet. App. 47a, 30a-31a; A. 83-85, 114-115.)

A week after this incident, the Assistant Plant Superintendent and the Company attorney came to see several employees in the plant concerning reports that they had been threatened by Company supervisors with reprisals for union activities. Thompson was one of the employees contacted. He was told by the Company attorney that the employees had the right to organize and could not be interfered with for doing so, and that the Company would "take action on this if it were true." Neither Company spokesman made specific reference to Supervisor Rike, nor was there evidence that Rike was disciplined or criticized in any way for his remarks to Thompson. (Pet. App. 47a, 31a-32a; A. 93, 129.)

The same day, July 20, the Company posted a notice in the plant stating, *inter alia*, that supervisors "are somewhat limited in what they can say about unions" and that the Company's supervisors had been instructed

not to interfere with the rights of employees to campaign either for or against unions. Six men, including Rike, were listed as plant supervisors, and the notice specifically distinguished between leadmen whose statements "for or against unions are their own opinions," and "the supervisors named above," who were "[t]he only people who can make statements on behalf of the company." (Pet. App. 48a-49a; A. 55-56, 76-78.)

On August 8, Supervisor Rike approached James Curry at his work station and told him that "the people who are pushing the union" would probably be fired, depending on the outcome of the organizational campaign. Curry, like Thompson, was a known union adherent (Pet. App. 24a, 49a; A. 71, 73, 87-88.) Although the Company later that month posted an official Board election notice stating that a representation election would be held, and listing employee rights protected against interference by employers and unions, no Company representative gave Curry any assurances against reprisals after this incident (Pet. App. 31a; A. 57, 78-80).

Rike did not directly supervise Curry and Thompson. However, as the supervisor of three inspectors who checked the quality of Curry's and Thompson's work in turning out machine parts on turret lathes, Rike had the final responsibility for approving the quality of work done by them and could direct his inspectors to require these employees to redo unsatisfactory work. (Pet. App. 13a-14a, 24a; A. 82, 116, 131-133, 136-141.)

On the foregoing facts, the Board found (Pet. App. 13a-14a) that the Company's efforts to counteract Rike's coercive statements were inadequate and that the statements were violations of Section 8(a)(1) of the Act,

29 U.S.C. 158(a)(1).[2] It ordered the Company to cease and desist from making statements like those found to have been made by Rike, and to post an appropriate notice (Pet. App. 15a-16a).

The court of appeals enforced the Board's order with a minor modification not here relevant (Pet. App. 56a-57a). The court noted that "the remarks by Rike found to have been made were strong ones," and held that the Board had not erred either in determining that the Company had not adequately remedied the impact of the threats, or in deciding that issuance of a remedial order was warranted in all the circumstances (Pet. App. 54a-55a).

ARGUMENT

The present case turns on the Board's assessment of the impact of discharge threats in a particular factual setting, and neither the Board's decision nor the decision of the court of appeals conflicts with any decision of this Court or of any court of appeals.

1. In the present case, two especially coercive statements—threats of discharge for union activities—were made by an admitted Company supervisor to two employees on two separate occasions. While Company spokesmen assured employees after the first incident that such remarks were not authorized, the same supervisor—identified in a plant notice as one of the "people who can make statements on behalf of the company"—again threatened that union activists might be discharged. Employees who knew of these threats thus

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[2]The Board, reversing the Administrative Law Judge, found that there was insufficient evidence to prove a further allegation in the complaint that the Company had threatened a third employee in violation of Secion 8(a)(1) of the Act (Pet. App. 14a-15a).

could well have believed that the plant notice and statements by other Company spokesmen affirming the employees' rights to engage in concerted activities were mere window dressing and that Supervisor Rike was conveying the real attitudes of management. In addition, as the Board found (Pet. App. 13a-14a), the authority of Rike himself over employees, including those to whom the remarks were made, was such that they would fear his enmity. Thus, regardless of whether the Company was actively seeking to discourage union activities, it was "in a position to secure [an] advantage" from Rike's threats *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 520.

Contrary to the Company's contention (Pet. 13), the Board did not create a rationale under which an employer "is powerless to voluntarily expunge the effects of unauthorized statements of its supervisors." The Board simply found that, in the circumstances here, the Company had not done enough to expunge the effects of such statements. As the Company points out (Pet. 12), the Board has not always reached the same result in cases involving employers' disavowals of unlawful conduct by supervisors. This is not because the Board has been remiss in developing an "ascertainable standard," but rather because each case necessarily turns on its facts. A rigid, *per se* rule would be no more appropriate for determining the adequacy of disavowals than it would be in determining whether the remarks themselves were coercive in the first place. The Board's factual finding here is not "so wanting in rational basis as to require or permit reversal." *National Labor Relations Board* v. *Austin Powder Co.*, 350 F. 2d 973, 976 (C.A. 6).

The Company errs in asserting (Pet. 7) that the court of appeals upheld the Board's conclusions in the face of

its own determination "that the oral and written repudiations and reassurances were effective in negating the effects of the statements by Foreman Rike." The court merely observed that the Company's assurances had an "*apparently* reassuring effect on *at least Thompson and Curry*" and that the assurances were "more specific than the general statements rejected as inadequate in other cases" (Pet. App. 53a-54a; emphasis added). The court noted, however, that Rike's statements "were strong ones" and that the Board, considering "the whole record," did not err in determining that employees at the plant might have felt coerced despite the Company's disavowals.

The decisions cited by the Company (Pet. 9-12) as conflicting with the decision of the court below are distinguishable. In *Pittsburgh S.S. Co.* v. *National Labor Relations Board*, 180 F. 2d 731, 739 (C.A. 6), affirmed on other grounds, 340 U.S. 498, the court found that there was no evidence that the employer was aware of any of the incidents concerned. In the present case the Company was informed of its supervisor's action. In *National Labor Relations Board* v. *Garland Corporation*, 396 F. 2d 707, 709 (C.A. 1), the statements made by the supervisors were less serious than the discharge threats made by Supervisor Rike. In any event, it is appropriate for this Court, as it reiterated in *Pittsburgh S.S. Co., supra*, 340 U.S. at 503, to " 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544."

2. There is no merit in the Company's contention (Pet. 14) that the Board erroneously failed to provide "any analysis or explication of the rea[s]ons for the need for a remedial order." The Board, as shown, found that

statements clearly violative of Section 8(a)(1) of the Act had been made by a Company supervisor and that the Company had not taken sufficient steps to repudiate his conduct. The Board thereupon (Pet. App. 15a-16a, 18a) issued a narrow cease-and-desist order and directed the posting of a notice in which the Company, backed by the authority of a federal agency, would assure the employees that no similar violations of the Act would in the future be committed on its behalf. Such cease-and-desist orders and notice-posting requirements have been used by the Board to assure employees of their rights from the earliest days of the Act's enforcement (see, *e.g.*, *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453, 462), and these provisions "are proper and accepted remedies" for violations of Section 8(a)(1) of the Act. *National Labor Relations Board* v. *Better Val-U Stores of Mansfield, Inc.*, 401 F. 2d 491, 493 (C.A. 2). The remedial order in the present case, unlike the broad order which was before this Court in *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 387 n. 6, is so closely tailored to the violations found that extensive "analysis" and "explication" are obviously unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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